Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

R. KEITH CULLINAN and CULLINAN ASSOCIATES, INC.,

Petitioners,

vs.

JERRY E. ABRAMSON, CHRISTINA HEAVRIN, STUART P. JAY, EARL MAC UNGER, JOHN H. NEVIN, WILLIAM C. BOONE, GREENEBAUM, TREITZ, BROWN AND MARSHALL, SAMUEL D. HINKLE and CULVER V. HALLIDAY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are private contract attorneys working for local city government entitled to qualified immunity under Section 1983?

2. Is it a private person's function or instead his status that determines whether qualified immunity is available to non-governmental officials?

3. Resolving a conflict among circuits, must a determination be made that a government official was performing a discretionary function within the scope of his official duties before that official can be eligible for qualified immunity under Section 1983?

4. Resolving a conflict among circuits, what standard should be applied in determining whether a constitutional right is clearly established under Section 1983?

5. Is qualified immunity from suit available under the Racketeer Influenced and Corrupt Organizations ("RICO") statute, when the underlying predicate act is criminal and no immunity for intentional wrongdoing existed at common law?

STATEMENT OF INTERESTED PARTIES

The City of Louisville is a Defendant in the original action in district court, but is not a party to this interlocutory appeal as it is not entitled to any immunity defenses. All action in district court, including Petitioners' claims against the City of Louisville, has been stayed pending the outcome of this interlocutory appeal.

Petitioner Cullinan Associates, Inc. has no parent company and no nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement of Interested Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes Involved in this Case	1
Statement of the Case	4
Reasons for Granting the Writ	7
I. The Opinion Below Granting Private Attorneys Qualified Immunity From Suit In § 1983 Actions Conflicts With This Court's Prior Rulings On The Unavailability Of Qualified Immunity Protection To Private Parties And Improperly Creates An Immunity Not Available At Common Law.	7
II. The Opinion Below Granting Respondent Jay Qualified Immunity Based On A Functional Analysis And Ignoring Respondent's Status As A Private Person Conflicts With This Court's Holding In *Richardson v. McKnight* And Reveals A Continued Confusion In The Court Of Appeals On This Issue.	11

Contents

Page

III. There Is A Conflict Among Circuits As To Whether A Party's Status As A Government Employee Automatically Entitles That Party To Qualified Immunity Or Whether The Official Must Have Been Acting Within The Scope Of His Official Duties And Performing Discretionary Functions In Order To Be Eligible For Qualified Immunity. 13

IV. There Is A Conflict Among Circuits As To Which Standard Should Be Applied In Determining Whether A Constitutional Right Is Clearly Established. 15

V. The Opinion Below Dismissed Petitioners' RICO Claims Under A Qualified Immunity Analysis Even Though RICO Is Based On Criminal Acts And Immunity For Such Acts Did Not Exist At Common Law. 19

Conclusion 22

TABLE OF CITATIONS

Cases Cited:

Allen v. McGraw, 119 F.3d 1129 (4th Cir. 1997) 14

Butz v. Economou, 438 U.S. 478 (1978) 14

Calhoun v. Gaines, 982 F.2d 1470 (10th Cir. 1992) .. 16

Contents

	Page
Clinton v. Jones, __ U.S. __, 117 S. Ct. 1636 (1997)	14
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1948)	6
Greene v. McElroy, 360 U.S. 474 (1959)	17
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	14, 15, 16, 18, 20
Lenz v. Winburn, 51 F.3d 1540 (11th Cir. 1995)	14
Merritt v. Mackey, 827 F.2d 1368 (9th Cir. 1987)	14
Mitchell v. Forsyth, 472 U.S. 511 (1985)	6, 21
P.B. v. Koch, 96 F.3d 1298 (9th Cir. 1996)	16
Powers v. Lightner, 752 F.2d 1251 (7th Cir. 1985), *overruled*, *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985)	20
Richardson v. McKnight, __ U.S. __, 117 S. Ct. 2100 (1997)	7, 9, 10, 11, 12
Rose v. Bartle, 971 F.2d 331 (3rd Cir. 1989)	21
Shechter v. Comptroller of the City of New York, 79 F.3d 265 (2nd Cir. 1996)	14
Tower v. Glover, 467 U.S. 914 (1984)	8, 9, 20

Contents

	Page
United States v. Lanier, __ U.S. __, 117 S. Ct. 1219 (1997)	16
Wade v. Hegner, 804 F.2d 67 (7th Cir. 1986)	16
Wyatt v. Cole, 504 U.S. 158 (1992)	7, 8
Statutes Cited:	
18 U.S.C. § 242	16
18 U.S.C. § 1341	19
18 U.S.C. § 1343	19
18 U.S.C. § 1951	19
18 U.S.C. § 1952	19
18 U.S.C. § 1961, *et seq.*	2, 19
18 U.S.C. § 1961(1)	2, 19
18 U.S.C. § 1962	4, 19
18 U.S.C. § 1964(c)	4
28 U.S.C. § 1291	6
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	i, 1, 2, 5, 6, 8, 15, 19, 20, 21

Contents

Page

United States Constitution Cited:

First Amendment 16, 17

Rules Cited:

Supreme Court Rule 13.1 1

Supreme Court Rule 13.3 1

Other Authorities Cited:

J. Bishop, Commentaries on Non-Contract Law, Section 704 (1889) 10

(KRS 521.020) 19

(KRS 518.020) 19

(KRS 506.010) 19

(KRS 506.040) 19

Contents

Page

APPENDIX

Appendix A — Opinion of the United States Court of Appeals for the Sixth Circuit Argued March 7, 1996 ..... 1a

Appendix B — Memorandum Opinion Of The United States District Court For The Western District Of Kentucky At Louisville Entered February 22, 1995 ..... 24a

Appendix C — Order Of The United States District Court For The Western District Of Kentucky At Louisville Entered February 22, 1995 ..... 90a

Appendix D — Order Of The United States Court Of Appeals For The Sixth Circuit Filed December 18, 1997 ..... 93a

Appendix E — Affidavit Of R. Keith Cullinan 95a

Petitioners, R. Keith Cullinan and Cullinan Associates, Inc., respectfully petition the Supreme Court to issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 128 F.3d 301 (6th Cir. 1997) (Appendix A). The district court's February 22, 1995 Memorandum Opinion and Order is unpublished. (Appendix B and C).

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision October 16, 1997. The Court of Appeals denied R. Keith Cullinan and Cullinan Associates, Inc.'s Petition for Rehearing and Suggestion for Rehearing *En Banc* on December 18, 1997. (Appendix D). Pursuant to Supreme Court Rule 13.1 and 13.3, this Petition has been filed within ninety (90) days of the denial of the Petition for Rehearing. The Supreme Court has jurisdiction to issue a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at

> law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, provides in pertinent part:

> **(1)** "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering). . . .

18 U.S.C. § 1961(1). RICO further provides:

> **(a)** It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through

collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

> **(d)** It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962. Finally, RICO provides:

> **(c)** Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

18 U.S.C. § 1964(c).

STATEMENT OF THE CASE

Petitioners, R. Keith Cullinan and Cullinan Associates, Inc., are independent investment managers of the pension fund of retired police officers of the City of Louisville, Kentucky. This case arises out of the City of Louisville taking so-called "excess funds" from the pension funds of retired Louisville police and firefighters in the late 1980s. Petitioners vociferously opposed the City's raiding of the funds and encouraged the Trustees of the Police Pension Fund to file a lawsuit against the City challenging the taking of the funds. In response, the City

threatened and ultimately filed a retaliatory suit against the Petitioners and the elected Trustees alleging, among other things, fraud and mismanagement by Petitioners. When the City's suit was temporarily stalled on a question of standing, the City next strong-armed Respondent John Nevin, as a private citizen and pensioner, to file a virtually identical suit against the Petitioners and elected Trustees. Both of these retaliatory suits were later unilaterally dropped by the City and by Nevin because there was no evidence to support any of the damaging and widely publicized claims against Petitioners.

In addition to filing these purely retaliatory suits, the City punished Petitioners in other ways for their public encouragement and support of the Trustees' suit against the City to recover the "excess funds." The City threatened the elected Trustees with personal liability unless they: (i) fired the Petitioners; (ii) barred Petitioners from serving the Pension Fund for twenty years; and (iii) turned over control of the Pension Fund to the Mayor, notwithstanding that to do so would violate state law. The City also engaged in such illegal tactics as refusing to give the Police Pension Fund monies appropriated by the City's Board of Aldermen and denying the Trustees of the Fund requests that Fund beneficiaries be paid certain bonuses. Respondents herein — Jerry Abramson, the Mayor of Louisville; Christina Heavrin, the City's law director; Earl Mac Unger, a City official; John Nevin and Stuart Jay, private persons acting at the behest of the City; William Boone, Sam Hinkle and Culver Halliday, private lawyers, and their law firm, Greenebaum, Treitz, Brown and Marshall, who represented the City — all worked in concert with the City in its retaliatory actions against the Petitioners.

As a result of these and other malicious and retaliatory actions, Petitioners filed a Complaint alleging ten causes of action including 42 U.S.C. § 1983 civil rights claims, Racketeer

Influenced and Corrupt Organizations ("RICO") claims, and state claims for defamation, wrongful use of civil proceedings, and abuse of process. Petitioner, R. Keith Cullinan, also filed a 14-page Affidavit in support of the Complaint. (Appendix E). Respondents filed Motions to Dismiss claiming absolute and qualified immunity on the § 1983 claims and absolute (but *not* qualified) immunity on the RICO claims. The District Court denied Respondents' Motions. (Appendix B and C). Respondents filed interlocutory appeals on the denial of immunity. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1948), which includes the right to an immediate appeal of orders denying immunity. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Oral arguments were held on March 7, 1996, and on October 16, 1997, the Court of Appeals reversed the District Court and held that all Respondents were entitled to qualified immunity. (Appendix A).

In so holding, Petitioners submit that the Court of Appeals: (1) improperly found three private attorneys and their law firm entitled to a qualified immunity from suit under § 1983; (2) applied the wrong legal standard in determining whether a private party is entitled to qualified immunity; (3) failed to determine whether governmental officials were acting within the scope of their official duties and performing discretionary functions; (4) applied an improper standard in determining whether Petitioners' constitutional rights were clearly established; and (5) applied the wrong legal standard in finding Respondents entitled to qualified immunity from RICO claims, as immunity from such claims did not exist at common law. Petitioners now ask for a Writ of Certiorari on these issues.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION BELOW GRANTING PRIVATE ATTORNEYS QUALIFIED IMMUNITY FROM SUIT IN § 1983 ACTIONS CONFLICTS WITH THIS COURT'S PRIOR RULINGS ON THE UNAVAILABILITY OF QUALIFIED IMMUNITY PROTECTION TO PRIVATE PARTIES AND IMPROPERLY CREATES AN IMMUNITY NOT AVAILABLE AT COMMON LAW.

Four of the Respondents in this case are three private attorneys and their law firm, who represented the City in the retaliatory suits filed against Petitioners. The law firm and the City had a written contract which specifically stated that the attorneys were not and did not become government officials by virtue of their representation of the City. (Agreement between Greenebaum, Treitz, Brown & Marshall and the City, Appendix E at 130a-136a). Nonetheless, the Court of Appeals held that the private attorneys and law firm were entitled to qualified immunity, a holding that conflicts with Supreme Court decisions which have denied immunity to private parties and public defenders. *See Richardson v. McKnight*, __ U.S. __, 117 S. Ct. 2100 (1997); *Wyatt v. Cole*, 504 U.S. 158 (1992) and *Tower v. Glover*, 467 U.S. 914 (1984).

In deciding whether private defendants enjoy immunity, this Court has looked to the historical origins in the common law and public policy concerns which underlie granting government employees immunity. *Richardson v. McKnight*, 117 S. Ct. at 2103-4. This Court has

> recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that

> talented candidates were not dete
> of damages suits from entering pu
> rred by the threat
> blic service.

Wyatt v. Cole, 504 U.S. at 167. This C
private parties qualified immunity from
the purpose behind qualified immu
government, and thereby to protect the
benefit its agents. These rationales are no
parties." *Wyatt v. Cole*, 504 U.S. at 168.
ourt has ***never*** granted
suit under § 1983, as
nity is "to safeguard
public at large, not to
t transferable to private

> In short, the nexus between pri
> historic purposes of qualified imm
> too attenuated to justify such an
> doctrine of immunity.
> vate parties and
> nunity is simply
> extension of our

Wyatt v. Cole, 504 U.S. at 168.

Whether private contract attorneys e
government should be treated different
parties is a question of great importance
of the qualified immunity doctrine under §
the status of private attorneys in the Ar
Private attorneys who receive fees for the
be immune for their actions by virtue o
client. Private attorneys may be entitled t
as a good faith defense, but they shou
complete immunity from suit. Nothing at
public policy reasons justify placing p
different position than any of the priva
examined by this Court.
mployed by local city
ly than other private
in defining the scope
1983, and in defining
nerican legal system.
ir services should not
the identity of their
other defenses, such
ld not be entitled to
common law nor any
rivate attorneys in a
te parties previously

This Court has once before addressed
immunity in *Tower v. Glover*, 467 U.S.
that public defenders are not entitled to im
This Court relied upon the history of a
the issue of attorney
914 (1984), holding
munity under § 1983.
ttorney immunity at

English common law. In England there is a distinction between barristers, who are not employed by clients and do not receive fees, and solicitors, who do have contracts with clients and are paid for their services. Under English common law, this Court noted that barristers are entitled to a broad immunity from liability for negligent misconduct because they are not free to pick and choose their clients and they have no contractual relationship with their clients and do not get a fee from their clients. However, "even barristers have never enjoyed immunity from liability for intentional misconduct." *Tower v. Glover*, 467 U.S. at 921. Here, Petitioners are complaining about intentional misconduct on the part of the attorneys, *i.e.*, retaliatory lawsuits and threats of the same. Further, and more importantly, the private attorneys in this case are not as much like English barristers as they are like English solicitors who pick and chose their clients, do have contractual relationships with them and are capable of suing their clients for fees. Respondents were retained by the City for a fee, they chose to represent the City as their client, they have a contractual relationship with the City which specifically states that they are not governmental employees, and they can sue the City for their fee if it is not paid.

Ironically, the Court of Appeals relied on *Richardson v. McKnight*, which held that private prison guards working at state correctional facilities are not entitled to qualified immunity, to come to the opposite conclusion with respect to private attorneys employed by a city. The Court of Appeals held that because the private attorneys were "acting as the City's agents," the rationale for qualified immunity should apply to them "in about the same way" as it would apply to the City's in-house counsel. *Cullinan v. Abramson*, 128 F.3d at 310. To so conclude misconstrues the common law and creates immunities for private lawyers that historically have never existed. The Court of

Appeals relied on the following passage in *Richardson* to reach this result:

> Apparently the law *did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign. See *Tower*, *supra*, at 921, 104 S. Ct. at 2825; *J. Bishop, Commentaries on Non-Contract Law*, §§704, 710 (1889). But we have found no indication of any more general immunity that might have applied to private individuals working for profit.

Richardson v. McKnight, 117 S. Ct. at 2105 (emphasis in original). Immunity for lawyers at British common law depended on whether the attorney received a fee, *i.e.*, whether they were barristers or solicitors.

> [L]iability is deemed in England to attach only to attorneys, who are entitled to enforce compensation for their services, not to counsel who cannot recover fees because their employment is in legal contemplation honorary. In an English book it is stated that there is no instance of a successful action for a barrister's neglect: but, if he "intentionally does a wrong, and acts with malice, fraud, or treachery in the discharge of his professional duties, he will be responsible like every other wrong-doer for the mischief thereby occasioned." With us, all lawyers stand as to their fees in the position of the English attorneys, and it is immaterial what may be the rights and liabilities of barristers.

J. Bishop, Commentaries on Non-Contract Law, Section 704 (1889).

In sum, there is no common law precedent entitling private fee based attorneys to immunity from suit. Further, there is no valid public policy reason for the Court of Appeals to now create such immunity and thereby protect private attorneys in ways not available to other private defendants. This Court needs to clarify whether private attorneys will now be entitled to qualified immunity as a special protection not available at common law or to other private defendants.

II.

THE OPINION BELOW GRANTING RESPONDENT JAY QUALIFIED IMMUNITY BASED ON A FUNCTIONAL ANALYSIS AND IGNORING RESPONDENT'S STATUS AS A PRIVATE PERSON CONFLICTS WITH THIS COURT'S HOLDING IN *RICHARDSON v. McKNIGHT* AND REVEALS A CONTINUED CONFUSION IN THE COURT OF APPEALS ON THIS ISSUE.

In addition to the attorneys, another Respondent in this case, Stuart Jay, was not a city employee. Jay was a non-resident of the City of Louisville, and he had been illegally appointed as the City Finance and Budget Director in violation of a statute which made non-residents of the City ineligible to hold that position. When this illegality came to light, Jay ultimately resigned and then was named a "special assistant" to the Mayor. The Mayor had publicly stated that Jay was "not a city employee." R. Keith Cullinan Affidavit at ¶ 12. (Appendix E at 95a, 102a). Instead, the City described Jay as a "volunteer." *Ibid.* Nonetheless, the Court of Appeals granted Respondent Jay qualified immunity holding that

> Defendant Jay was acting as the City's Director of Finance and Budget, a post he occupied from 1986 to 1992 . . . what counts, in our view, is the function; whether Jay was legally entitled to hold the office he occupied is immaterial.

Cullinan v. Abramson, 128 F.3d at 310. (Appendix A at 17a). Petitioners respectfully submit that the legality and illegality of a person's job is very material, among other things, in determining entitlement to qualified immunity.

The functional analysis test employed by the Court of Appeals is the wrong standard to determine whether a private citizen is entitled to qualified immunity. *See Richardson v. McKnight*, 117 S. Ct. at 2106. As this Court specifically noted in *Richardson v. McKnight*, this Court "has sometimes applied a functional approach in immunity cases, but only to decide which type of immunity — absolutely or qualified — a public officer should receive." *Richardson v. McKnight*, 117 S. Ct. at 2106. This Court refused to apply the functional approach for private parties and rejected the functional argument that since private prison guards performed the same functions as state prison guards they should be entitled to the same level of immunity as governmental employees. This Court noted that

> [i]ndeed a purely functional approach [to private parties] bristles with difficulty, particularly since, in many areas, government and private industry may engage in fundamentally similar activities, ranging from electricity production, to waste disposal, to even mail delivery.

Richardson v. McKnight, 117 S. Ct. at 2106.

Despite the *Richardson v. McKnight* holding, the Court of Appeals applied a functional approach to determine that a private party who illegally took the title of a governmental official is entitled to qualified immunity. Applying such reasoning, a private citizen performing police functions while illegally impersonating a police officer would also be entitled to qualified immunity. Clarification is needed from this Court as to those

circumstances when applying a functional approach is appropriate, and particularly whether it can be used to allow immunity to a private party who pretends to be, or illegally assumes the position and performs the duties of, a public employee.

III.

THERE IS A CONFLICT AMONG CIRCUITS AS TO WHETHER A PARTY'S STATUS AS A GOVERNMENT EMPLOYEE AUTOMATICALLY ENTITLES THAT PARTY TO QUALIFIED IMMUNITY OR WHETHER THE OFFICIAL MUST HAVE BEEN ACTING WITHIN THE SCOPE OF HIS OFFICIAL DUTIES AND PERFORMING DISCRETIONARY FUNCTIONS IN ORDER TO BE ELIGIBLE FOR QUALIFIED IMMUNITY.

The Court of Appeals found four Respondents — the Mayor, Jerry Abramson; the City's illegally appointed Director of Finance and Budget, Stuart Jay; the City's Law Director, Tina Heavrin; and a retired City police officer and beneficiary of the Pension Fund, John Nevin — entitled to qualified immunity based purely on their identities as governmental employees. The Court of Appeals never asked or even considered whether those parties were acting within the scope of their official duties or whether they were performing discretionary functions when they engaged in malicious and retaliatory conduct against Petitioners. This analysis conflicts with other circuits.

Merely because and individual is employed by the government does not automatically entitle him to qualified immunity protection. The Second, Fourth, Ninth and Eleventh Circuits have all held that in order for government officials to

be eligible for qualified immunity, they must demonstrate that the specific acts at issue were performed within the scope of their official duties. *Shechter v. Comptroller of the City of New York*, 79 F.3d 265, 270 (2nd Cir. 1996); *Allen v. McGraw*, 119 F.3d 1129, 1129-1130 (4th Cir. 1997); *Merritt v. Mackey*, 827 F.2d 1368, 1374 (9th Cir. 1987); *Lenz v. Winburn*, 51 F.3d 1540, 1545 (11th Cir. 1995). The Sixth Circuit's ruling here conflicts with these circuits, in that it never required such a determination before granting qualified immunity. It also conflicts with rulings by the Supreme Court, which has held that qualified immunity applies only to "government officials performing discretionary functions," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and that governmental officials receive no immunity for actions that are taken beyond the scope of their authority. *Butz v. Economou*, 438 U.S. 478, 489-90 (1978). Most recently, this Court held that any "effort to construct an immunity from suit for unofficial acts grounded purely in the identity of its office is unsupported by precedent." *Clinton v. Jones*, 117 S. Ct. at 1644. In *Clinton v. Jones*, the Court held that "the principal rationale for affording certain public servants immunity from suits for money damages arising out of their official acts is inapplicable to unofficial conduct." *Clinton v. Jones*, __ U.S. __, 117 S. Ct. 1636, 1643 (1997).

The legal significance of the Court of Appeals' failure to examine whether the individual government officials were performing discretionary functions within the scope of their officials duties is best illustrated with Respondent Nevin. Nevin is a retired police officer and as such, a beneficiary of the Pension Fund. As alleged in the Complaint, which must be taken as true, the City of Louisville strong-armed Nevin to file a virtually identical suit to one it had already filed against Petitioners and the elected Trustees of the Pension Fund. Nevin agreed to file such suit only on the condition of being granted indemnity. At the time he filed suit, he happened coincidentally to be a city/

county employee with the Disaster and Emergency Services Department, a department which deals with snow, flooding and other such emergencies and which had absolutely no connection with, nor duties relating to, the Policemen's Pension Fund. There is no proof in the record (nor could there be any serious contention) that the scope of Nevin's official duties as an employee of the Disaster and Emergency Services Department encompassed the Police Pension Fund. Further, there is no proof that Nevin even performed discretionary functions as a Disaster and Emergency Services Department employee.

If the Court of Appeals decision is allowed to stand, defendants to § 1983 actions would be entitled to qualified immunity protection by merely asserting government employee status. No such broad immunity existed at common law. While this Court has always been reluctant to create new immunities, the Court of Appeals, by ignoring the "scope of official duties" requirement, has done just that and has applied a standard in conflict with four other circuits. This Court needs to resolve whether, in performing a qualified immunity analysis, a court should first be required to determine whether a governmental official was acting within the scope of his authority and performing a discretionary function therein ***before*** addressing other factors bearing on qualified immunity such as examining whether the official violated a clearly established constitutional right.

IV.

THERE IS A CONFLICT AMONG CIRCUITS AS TO WHICH STANDARD SHOULD BE APPLIED IN DETERMINING WHETHER A CONSTITUTIONAL RIGHT IS CLEARLY ESTABLISHED.

In analyzing whether Petitioners' constitutional rights had been clearly established under the objective test of *Harlow v.*

Fitzgerald, the Court of Appeals improperly required a "extreme level of factual specificity," a standard which this Court recently rejected in the context of 18 U.S.C. § 242 claims in *United States v. Lanier*, __ U.S. __, 117 S. Ct. 1219 (1997), and which conflicts with the legal norm standard applied by other circuits. Petitioners' constitutional claim boils down to this: a reasonable public official should have known that it would be improper to tortiously or criminally retaliate against a person for exercising his First Amendment rights to speak on matters of public concern. But, the Court of Appeals framed Petitioners' claim differently, holding that a government official would have had to specifically know that

> the First Amendment (a) forecloses efforts to replace a pension fund money manager whose investment strategies run counter to those favored by the finance director of the City whose police officers are the beneficiaries of the plan, and (b) immunizes the money manager from retaliatory litigation.

Cullinan v. Abramson, 128 F.3d at 311 (Appendix A at 20a).

The Court of Appeals' requirement of "extreme factual specificity" conflicts with the less stringent "legal norm" requirement applied in other circuits as to what is necessary to show the existence of a clearly established constitutional right. *P.B. v. Koch*, 96 F.3d 1298, 1302 (9th Cir. 1996); *Calhoun v. Gaines*, 982 F.2d 1470, 1474 (10th Cir. 1992); *Wade v. Hegner*, 804 F.2d 67, 71 (7th Cir. 1986). Those circuits focus on whether the legal norms governing behavior are clearly established legal norms, not on whether the exact action has previously been prohibited. This Court needs to decide which standard should be applied in determining clearly established rights. Allowing courts to require extreme factual specificity creates incongruous results. For example, with this case, a United States Court of

Appeals decision can now be cited for the proposition that it is reasonable for a public official to think he/she can take retaliatory action against individuals who exercise their First Amendment rights to speak out on matters of public concern. How could it ever be reasonable to use tortious and criminal actions to retaliate against somebody for exercising a constitutionally protected right?

Similarly, Petitioners also claimed violation of their constitutional right to be free from tortious or criminal retaliatory actions by government officials which interfere with their property interests as a result of their speaking out on matters of public concern. While the Court of Appeals acknowledged that under *Greene v. McElroy*, 360 U.S. 474 (1959), there is a constitutional right to hold specific private employment and to follow a chosen profession free from unreasonable government interference, it in effect held that interfering with those property interests by retaliating for an exercise of constitutionally protected First Amendment rights to speak out on matters of public concern is not clearly established. *Cullinan v. Abramson*, 128 F.3d at 312 (Appendix A at 21a). This inherently contradictory result arose because, again, the Court of Appeals required extreme factual specificity:

> But it is not correct, in our view, to conclude that Mr. Cullinan had a "clearly established" constitutional right not to be included as a defendant in the city's suit against the elected pension fund trustees. Neither is it correct to conclude that Messrs. Jay and Unger, the trustees who served on the pension fund board *ex officio*, were constitutionally barred from trying to persuade their fellow trustees to fire a money manager whose covered call writing strategy was considered, rightly or wrongly, to be ill-advised.

Cullinan v. Abramson, 128 F.3d at 312 (Appendix A at 21a-22a). Indeed, in requiring "extreme factual specificity" the Court of Appeals miscasts the complaint. It is not "persuading" or "being named" which is the problem — it is the ***retaliation*** by "being named" in a ***groundless*** suit and the "persuading" by ***threats and intimidation*** which is the problem. Petitioners' constitutional claim is that their property interests were interfered with by retaliatory actions as a result of Petitioners' exercise of their constitutionally protected rights to speak out on matters of public concern. Again, if a government official knows that people have constitutionally protected property interests to follow a chosen profession free from government interference (which the Court of Appeals acknowledged), then retaliation for exercising that right should never be considered reasonable by public officials. Yet, that is exactly what the Court of Appeals held.

The level of specificity required by the Court of Appeals in this case not only creates results that run counter to common sense, but it also conflicts with the standard applied in three other circuits that do not require clearly established rights to have been explicitly addressed previously. In short, this Court needs to clarify that the *Harlow* objective inquiry into clearly established constitutional rights should focus on whether the legal norms governing behavior were clearly established and that it does not require an extreme degree of factual correspondence between the cases establishing the precedent and the case at issue.

V.

THE OPINION BELOW DISMISSED PETITIONERS' RICO CLAIMS UNDER A QUALIFIED IMMUNITY ANALYSIS EVEN THOUGH RICO IS BASED ON CRIMINAL ACTS AND IMMUNITY FOR SUCH ACTS DID NOT EXIST AT COMMON LAW.

Petitioners brought claims against Respondents for various violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.* The RICO statute defines four categories of prohibited racketeering activities, all of which Petitioners alleged. 18 U.S.C. § 1962; Amended Complaint at ¶ 97-102; *Cullinan v. Abramson*, 128 F.3d at 307 (Appendix A at 10a-11a).

Under the RICO statute, "racketeering activities" include any threat or act involving specified state-law crimes, specified acts such as fraud, extortion and bribery indictable under certain federal statutes and certain other identified federal offenses. 18 U.S.C. § 1961(1). Petitioners' Complaint alleged state-law crimes of bribery of a public servant (KRS 521.020), commercial bribery (KRS 518.020), criminal attempt (KRS 506.010) and criminal conspiracy (KRS 506.040). Petitioners also alleged violations of the Hobbs Act, 18 U.S.C. § 1951; the Travel Act, 18 U.S.C. § 1952; and the Mail Fraud Act, 18 U.S.C. §§ 1341, 1343. These predicate acts of racketeering activity are criminal in nature.

Although Petitioners' RICO claims are separate and distinct from their § 1983 claims against Respondents, the Court of Appeals dismissed the RICO claims under a § 1983 analysis. Specifically, the Court of Appeals addressed the RICO claims as follows:

> As far as the plaintiffs' RICO claim is concerned, it would unduly prolong an opinion that may already

> have tested the acceptable limits of prolixity if we were to explore in depth the arguments on which that claim rests. The arguments are ingenious, but we know of no Supreme Court or Sixth Circuit precedent that could properly be said to have informed the defendants that they could not do what they stand accused of doing without violating "clearly established" rights conferred on the plaintiffs by the RICO statute. As far as we are concerned, this ends the matter.

Cullinan v. Abramson, 128 F.3d at 312 (Appendix A at 22a).

The "clearly established" *Harlow* test is the wrong legal standard to apply to RICO claims. RICO violations involve claims of criminal wrongdoing and unlawful acts. By definition, RICO claims involve allegations of intentional misconduct. As discussed more fully above, the common law upon which § 1983 qualified immunity is based did not grant immunity for intentional misconduct. *Tower v. Glover*, 467 U.S. at 921. In fact, on appeal Respondents did not even argue that they were entitled to qualified immunity on the RICO claims. Instead, Respondents claimed entitlement to absolute immunity to RICO claims, a defense which the Court of Appeals Opinion did not discuss, and which the District Court dismissed on grounds that Respondents are not entitled to absolute immunity for any claim as they are not judges, prosecutors or legislators. (Appendix B at 43a-44a, Appendix C at 90a).

Two other circuit courts have addressed this issue indirectly. In *Powers v. Lightner*, 752 F.2d 1251 (7th Cir. 1985), *overruled*, *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985), the Seventh Circuit was asked to determine whether defendant federal officials were allowed an interlocutory appeal from denial of qualified immunity on both § 1983 and RICO claims. The

Seventh Circuit never addressed the substantive question of whether qualified immunity was appropriate for RICO claims, since it ruled there was no right to interlocutory appeal on qualified immunity questions in the first instance. This ruling was later overruled as a result of *Mitchell v. Forsyth*, 472 U.S. 511 (1985). On the other hand, the Third Circuit, while also not directly addressing the issue of qualified immunity to RICO claims, did allow RICO actions to proceed against individual claimants even after dismissing § 1983 claims on immunity grounds. *Rose v. Bartle*, 971 F.2d 331 (3rd Cir. 1989). This Court needs to clarify whether RICO claims can be subject to qualified immunity defenses.

It cannot be the law of the land that individuals who engage in criminal conduct are entitled to qualified immunity. Such immunity was not granted at common law and this Court should grant Certiorari to determine whether such immunity should be created for RICO defendants. Individuals acting under color of state law should not be able to commit criminal acts and then claim immunity for such acts when claim is made under RICO. Granting such immunity is not good public policy, as it tells individuals that they can perform the predicate criminal acts and then avoid accountability for their conduct merely by claiming qualified immunity.

CONCLUSION

For the above stated reasons, Petitioners, R. Keith Cullinan and Cullinan Associates, Inc., respectfully request their Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ARGUED MARCH 7, 1996

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

R. KEITH CULLINAN and CULLINAN ASSOCIATES, INC.,
Plaintiffs-Appellees,

v.

JERRY E. ABRAMSON, CHRISTINA HEAVRIN (95-5416), STUART P. JAY, EARL MAC UNGER, JOHN H. NEVIN (95-5417), SAMUEL D. HINKLE IV, CULVER V. HALLIDAY, GREENEBAUM, TREITZ, BROWN & MARSHALL (95-5418), and WILLIAM G. BOONE (95-5419),
Defendants-Appellants,

CITY OF LOUISVILLE,
Defendant.

Nos. 95-5416/5417 /5418/5419

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 94-00198--Charles R. Simpson, Chief District Judge.

Argued: March 7, 1996

Appendix A

Decided and Filed: October 16, 1997

Before: NELSON and SILER, Circuit Judges; WISEMAN, District Judge.*

COUNSEL

ARGUED: Donald L. Cox, LYNCH, COX, GILMAN & MAHAN, Louisville, Kentucky, for Appellant. Ann B. Oldfather, OLDFATHER & MORRIS, Louisville, Kentucky, for Appellee. **ON BRIEF:** Donald L. Cox, Mary J. Lintner, LYNCH, COX, GILMAN & MAHAN, Louisville, Kentucky, David L. Leightty, Louisville, Kentucky, William H. Hollander, Frank W. Burke, Sr., Virginia H. Snell, K. Gregory Haynes, WYATT, TARRANT & COMBS, Louisville, Kentucky, Frank P. Doheny, Jr., HIRN, DOHENY & HARPER, Louisville, Kentucky, William C. Boone, Jr., LAW OFFICES OF WILLIAM C. BOONE, Louisville, Kentucky, for Appellant. Jennifer J. Hall, OLDFATHER & MORRIS, Louisville, Kentucky, for Appellee.

OPINION

DAVID A. NELSON, Circuit Judge. The plaintiffs — independent investment managers who handle a portion of the assets of a Louisville, Kentucky, police pension fund — brought a federal civil rights/RICO lawsuit against the city, its outside lawyers, the mayor, and other city officials, all of whom were said to have been involved in efforts to have the

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

plaintiffs fired as investment managers for the pension fund. The defendants moved for dismissal of the complaint under Rule 12, Fed. R. Civ. P., asserting, among other defenses, absolute and qualified immunity from suit on both the federal claims and numerous pendent state law claims by which the federal claims were accompanied.

The district court largely denied the motions to dismiss, and each of the defendants except the city perfected an interlocutory appeal from the denial of immunity. The plaintiffs then moved to dismiss the appeals on finality and substantiality grounds, but another panel of this court ruled against the plaintiffs on these issues.

We now conclude that the appellant defendants are entitled to qualified immunity on the federal claims. The denial of such immunity will be reversed. In remanding the case, we shall give the district court an opportunity to consider the appropriate disposition of the state law claims in light of our ruling on the federal claims.

I.

The plaintiffs' allegations are set forth in a 33-page complaint, a 14-page affidavit, and 13 exhibits. We accept as true, for present purposes, all well-pleaded, non-conclusory allegations contained in the plaintiffs' papers.

A. Background - Plaintiffs

In the mid-1960s, it appears, the City of Louisville established a pension system for its police officers. The system, which is operated by a governing body commonly referred to as the board of trustees, is funded with appropriations from the city and with contributions from participating police officers.

The trustees of the pension fund engaged Stock Yards Bank & Trust Co. to manage a portion of the fund's assets. In 1977 plaintiff R. Keith Cullinan, who was employed by the bank as

a trust officer for a number of years,[1] was placed in charge of investing these holdings.

Since January of 1990 Mr. Cullinan has been the president and chief executive officer of plaintiff Cullinan Associates, Inc., an investment management firm of which Mr. Cullinan is a shareholder. Through Cullinan Associates he has continued to manage a portion of the police pension fund's assets. Cullinan Associates is compensated for its services by fees that are generally set as a percentage of the assets under its management.

In his work for the pension fund, both as an employee of the bank and as an employee of Cullinan Associates, Mr. Cullinan has made extensive use of a technique known as covered call option writing. A call option is a contract that gives the purchaser of the option the right to buy shares of stock in a specified company at a specified price within a specified period of time. If the market price of the stock fails to rise above the specified price before the option has expired, the holder of the option will have no incentive to exercise the call, and the seller (or "writer") of the option will get to keep the premium paid by the purchaser without having to part with any shares of stock. If the market price of the stock does rise above the price specified in the option, on the other hand, the holder of the option can be expected to exercise the call — and the writer of the option, while still retaining the premium, will have to part with the stock for less than its current worth.[2]

If the writer of the option does not already own the stock — if the option is "naked," in the argot of the trade — the writer will have to buy shares on the open market in the event

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[1] Mr. Cullinan rose through the ranks to the position of executive vice president, and he became a member of the bank's board of directors.

[2] For a price, of course, the option writer can buy back the option (or an equivalent option) at any time.

of a call. But the option writer need not buy shares if the option is "covered;" the writer of a covered option can meet the call with stock the writer already owns. The writing of covered options is thus considered more conservative than the writing of naked options.

Both techniques generate brokerage commissions that would not have to be paid if the options were not written. Stockbrokers benefit from option writing whether share prices rise, fall, or stay the same. If the market price of a security on which options have been written does not rise too much during the option period, the writer of the option likewise stands to benefit.

Although views differ as to the extent to which option writing makes sense from the option writer's standpoint, a majority of the members of the board of trustees of the police pension fund appear to have been well satisfied with the performance of the portion of the assets managed by Mr. Cullinan. A study conducted by a brokerage firm in March of 1988 showed that over the preceding ten years the assets managed by Mr. Cullinan produced an annual return of 14.75%. Another brokerage firm calculated that the return had been 15.01% per annum. The net return for 1992 was 11.5%, and for 1993 it was 13.2%. The record does not disclose what the returns would have been had Mr. Cullinan made the same stock selections without employing the covered option writing technique,[3] but the Cullinan affidavit says that during 1992 and 1993 the police pension fund made profits of $2,397,680 on covered call options that expired without having been exercised.

In addition to managing assets for the police officers' pension fund, Mr. Cullinan provided investment management services to the Louisville Firefighters' Pension Fund during

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[3]We do not know, similarly, whether Mr. Cullinan would have invested in the same stocks had he not planned to write options on them.

a period that began in 1978 and ended in August of 1986. He used the covered call option writing technique for the firefighters' assets as well. The record does not disclose what percentage of the fund's total assets he managed, but Stock Yards Bank received more than half the city's 1985 contribution to the firefighters' fund. For the five years ended March 31, 1985, we are told, the performance of the total portfolio of the firefighters' fund was ranked near the top of a group of 100 comparable funds.

B. Background - Defendants

In November of 1985 defendant Jerry E. Abramson was elected mayor of the City of Louisville. After taking office in January of 1986 he appointed defendant Stuart P. Jay to the position of director of finance and budget for the city.

Mr. Jay, described in a 1983 magazine article as "one of Louisville's young millionaires," is said to have been chairman of RETS Electronic Institute until he sold it in 1985. He apparently decided to donate his services to the city — a decision that may or may not have been influenced by the fact that his home was located several hundred feet outside the city limits and he thus failed to meet a statutory residency requirement. The residency issue came to public attention in 1992, and Mr. Jay then relinquished the director of finance position to become a special assistant to the mayor.

At the time of his appointment as director of finance, Mr. Jay was on record as having disputed the efficacy of covered call option writing. (The complaint describes him as "a long-time opponent of this investment strategy . . . .") The director of finance is a member of the police pension fund board of trustees *ex officio*, and from the inception of his service on the board Mr. Jay attempted — unsuccessfully, as it turned out — to have Mr. Cullinan fired as one of the fund's money managers. Jay was joined in this effort by defendant Earl Mac Unger, a city employee who was likewise an *ex officio* member of the board of trustees. Jay and Unger were critical

of the brokerage commissions paid by the fund on transactions involving assets managed by Cullinan, and Jay had his own investment strategies that he wanted the pension fund to follow.

The city was facing serious financial problems when the Abramson administration took office in 1986, and one of the ways in which the new mayor hoped to ease these problems was by having active members of the public safety forces transferred to the County Employee Retirement System. With the city's support, legislation making such transfers possible was enacted by the Kentucky General Assembly in April of 1986. The legislation provided, among other things, that

> "If policemen of [a] city of the first class [having a police officers' pension system] elect entry into the County Employees Retirement System and thereby create excess funds [in the municipal pension system] . . . these excess funds shall be distributed to the city for use by the city for any other purpose it may elect . . . ." KRS 95.290(3).

Louisville police officers who were on active status in 1986 could elect to transfer to the county retirement system, as we understand it, and police officers hired in the future were to be placed in the county system automatically. In July of 1986 the city calculated that nearly $4 million (out of approximately $84 million in the police officers' pension fund prior to the split-up of the fund) had become "excess" as a result of transfers to the county retirement system. Pursuant to an agreement negotiated with the collective bargaining representative of the police officers, the plaintiffs' complaint avers, $3,955,540 was withdrawn from the police pension fund for uses agreed to by the city and the bargaining representative.[4]

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[4]The complaint also contains an oblique reference to the withdrawal from the firefighters' pension fund of "excess funds" in an amount of approximately $20 million.

Appendix A

C. Prior Litigation

Mr. Cullinan repeatedly voiced opposition to any withdrawal of excess funds from the police pension fund, and he urged the board of trustees to contest the withdrawal. The board did so. In October of 1989, after attempts to negotiate a settlement had proved unsuccessful, the police pension fund filed a lawsuit against the city in a Kentucky state court. Alleging that the 1986 amendments to KRS 95.290 were unconstitutional and that the city's withdrawal of funds was illegal, the complaint sought the return of approximately $3.4 million.

The city retained outside legal counsel for the defense of the lawsuit, entering into a professional service agreement with defendant Greenebaum, Treitz, Brown & Marshall ("GTB&M"), as the firm subsequently came to be known. Defendant William C. Boone, Jr., a partner of the defendant law firm at the time the pension fund filed its suit, was initially the lead attorney for the city. Defendant Samuel D. Hinkle, another GTB&M partner, subsequently replaced Boone as lead attorney. Defendant Culver W. Halliday, a GTB&M employee, also worked on the litigation.

In April of 1990 attorney Boone informed counsel for the pension fund, in writing, that the city planned to file a state court action against the fund's five elected trustees and others (including Stock Yards Bank, Mr. Cullinan and Cullinan Associates) for "breach of fiduciary duty in employing the so-called 'covered call option trading strategy' resulting in excessive trading and improper mix of investments, excessive transactions, excess fees and commissions and reporting of incorrect value of Fund Assets." Counsel for the city further stated that the proposed complaint would not be filed if the pending "excess funds" litigation were dismissed with prejudice and if the pension fund's board of trustees met a number of other conditions. Among the conditions proposed were these: that Stock Yards Bank, Cullinan Associates, R. Keith Cullinan, and certain named stockbrokers would be

barred from doing business with the police pension fund for 20 years; that the board of trustees would conduct competitive bidding for investment services under procedures to be approved by the city's director of finance; that no more than one-third of the fund's assets would be placed with a single investment manager; and that no more than 45 percent of the assets would be invested in stocks without approval of the director of finance.

The pension fund declined to accept these terms, and the city promptly filed the threatened lawsuit. The state trial court dismissed the suit on the ground that the city lacked standing to sue. The Supreme Court of Kentucky reversed the dismissal, however, and ordered the suit reinstated. The Supreme Court pointed out that the city was required to "guarantee payment of pension benefits in the event of a shortfall of investment income and member contributions," and the Court went on to observe that "[n]ot only has [the city] made direct payments to the fund to maintain its fiscal soundness, it also has the additional duty, in the interest of sound public policy, to guarantee that active police officers have a dependable pension plan, one free of waste and mismanagement." *Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 328-29 (Ky. 1992).

A few months after the Supreme Court ordered reinstatement of the city's lawsuit, Stock Yards Bank entered into a settlement agreement under which the bank was to pay the city $175,000 in return for the dismissal of both the city's suit and a substantially identical suit brought by defendant John H. Nevin. (Mr. Nevin, a city employee who was a pension plan beneficiary, had been asked to bring the suit after the city's action had been dismissed for lack of standing; Nevin's counsel of record was defendant Christina Heavrin, the law director of the city.)

Mr. Cullinan knew nothing of the settlement agreement until after it had been signed. His counsel subsequently asked the city's counsel not to have the claims against Cullinan and

his firm dismissed, but this request was ignored. Orders dismissing with prejudice all claims against Mr. Cullinan and Cullinan Associates were tendered by the city and entered by the state court. Mr. Cullinan and his company paid nothing toward the settlement, and they have consistently maintained that the claims against them were baseless.

II.

The present lawsuit was commenced in federal district court in March of 1994. The citizenship of the parties is not diverse, but the plaintiffs invoked the court's federal question jurisdiction by asserting claims for relief under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, and the Ku Klux Klan Act of 1871, now codified at 42 U.S.C. § 1983.

Section 1983 provides for civil liability on the part of any person who, under color of state law, subjects any U.S. citizen or other person within this country's jurisdiction to a deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States. Mr. Cullinan and his company asserted that they were the victims of retaliation because of their publicly stated opposition to the city's withdrawal of excess funds from the police pension system.[5] The defendants, they said, thus deprived them of free speech rights secured by the First Amendment. The plaintiffs further alleged that the defendants interfered with their Fourteenth Amendment right not to be deprived of property without due process of law.

The RICO statute creates a treble-damages remedy for any person injured in his business or property by reason of a

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[5]The complaint also alleged that the defendants' objectives, in addition to giving the city more control over the selection of investment managers and investment strategies for the police pension fund, included the forestalling of a prospective suit against the city to recover the $20 million in excess funds taken from the firefighters' pension fund.

violation of 18 U.S.C. § 1962. Section 1962 provides, among other things, that funds derived from a pattern of racketeering activity may not be used or invested in the acquisition or operation of any enterprise engaged in or affecting interstate commerce; that no person may acquire or maintain any interest in or control of an enterprise engaged in or affecting interstate commerce if the acquisition or maintenance of such interest or control is accomplished through a pattern of racketeering activity; that no person employed by or associated with an enterprise engaged in or affecting interstate commerce may conduct or participate in the affairs of such enterprise through a pattern of racketeering activity; and that no person may conspire to violate any of the above prohibitions. Each of the defendants except the city was accused by Cullinan and Cullinan Associates of violating one or more of these RICO provisions. We shall spare the reader the details of the plaintiffs' theories in this regard.

In addition to asserting claims under RICO and § 1983, the plaintiffs asserted pendent state law claims for wrongful use of civil proceedings; abuse of process; interference with prospective and actual contractual relationships; punitive damages under KRS 411.182; and outrageous conduct causing severe emotional distress to Mr. Cullinan. The plaintiffs further sought to hold the city liable as an indemnitor for damages awarded against other defendants; to hold defendants Jay, Unger and Heavrin liable for violations of miscellaneous state statutes; and to hold Mayor Abramson and the City of Louisville liable for defamation. The plaintiffs' damages were alleged to be in excess of $10 million.

In due course the defendants moved, individually or in groups, for dismissal of the complaint. The grounds on which the defendants relied included both absolute immunity and qualified immunity. After the issues had been thoroughly briefed by the parties, the district court entered an order dismissing certain portions of the RICO and defamation claims, all of the indemnity and outrageous conduct claims,

portions of the claims for interference with contractual relationships, and the abuse of process and § 1983 claims asserted against defendant Boone. In all other respects the motions to dismiss were denied.

The district court did not rule out the possibility that some or all of the defendants might be entitled to qualified immunity. Observing that "[d]ismissal on the basis of qualified immunity is typically granted at the summary judgment level," however, the court concluded that "the status [of] and actions taken by each defendant need further fleshing out."

Pursuant to the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), all of the defendants except the City of Louisville took interlocutory appeals from the denial of immunity. *Cf. Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982) (citing cases in which the right to an immediate appeal of orders denying immunity has been recognized).

III.

A. Absolute Immunity from Suit on Federal Claims

Judges and prosecutors have long been held to be absolutely immune from being sued on account of their judicial or prosecutorial acts. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Butz v. Economou*, 438 U.S. 478 (1978); *Burns v. Reed*, 500 U.S. 478 (1991).[6] Section 1983 was not intended to abolish this immunity (see *Pierson v. Ray*, 386 U.S. 547 (1967)), and we have been given no reason to suppose that RICO was intended to abolish it either. It would be

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[6] Such immunity also extends to legislators and their aides when performing acts of a legislative nature, see *Gravel v. United States*, 408 U.S. 606 (1972), and to witnesses testifying in court, see *Briscoe v. LaHue*, 460 U.S. 325 (1983).

anomalous, we think, if officials who are immune from suit for alleged violations of the Constitution itself should be denied immunity from suit for alleged violations of a statute that does not incorporate the Constitution — particularly a statute as amorphous as RICO. See *Linne v. Rideoutte*, 971 F.2d 766 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993), where the enactment of RICO was held not to have abrogated the immunities by which government officials and witnesses are protected from civil damage claims. To the same effect see *Thillens, Inc. v. Community Currency Exch. Ass'n of Illinois, Inc.*, 729 F.2d 1128 (7th Cir.), *cert. dismissed*, 469 U.S. 976 (1984), a case involving state legislators.

Executive branch officials other than prosecutors may be entitled to absolute immunity from suit for acts that are functionally equivalent to the acts of prosecutors or judges. See *Butz*, 438 U.S. at 511-12 (agriculture department chief hearing officer, judicial officer, and agency attorney conducting administrative trial may be entitled to absolute immunity for acts connected with administrative proceedings brought against a vocal critic of the department); *Watts v. Burkhart*, 978 F.2d 269 (6th Cir. 1992) (en banc) (members of state medical licensing board held entitled to absolute immunity from suit under § 1983 for damages resulting from revocation of a physician's license to practice medicine); *Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir.), *cert. denied*, 506 U.S. 819 (1992) (town manager and corporation counsel held entitled to absolute immunity for authorizing a civil lawsuit by the municipality against a newspaper editor and a publisher who had been critical of the municipal police department).

Absolute immunity is not the norm, however. For executive branch officials in both state government (see *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974)) and federal government (see *Butz*, 438 U.S. at 507), the form of immunity once known as "good faith" immunity and now called "qualified" immunity is generally deemed sufficient to

vindicate the important public interest in allowing government officials to do their work without undue fear of being haled into court for perceived missteps.[7] *Butz* held that "in a suit for damages arising from unconstitutional action . . . executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." 438 U.S. at 507 (footnote omitted). "[O]fficials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506.

The defendants in the case at bar argue vigorously that they are entitled to absolute immunity with respect to the alleged violations of the plaintiffs' civil rights, the activities in question being functionally equivalent to quasi-judicial activities for which absolute immunity has been held to be available. We conclude that the defendants are entitled to qualified immunity in any event, however, and we shall pretermit the question of their entitlement to absolute immunity.

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[7] A classic justification for immunity from suit on claims arising out of an official's performance of official duties was offered by Judge Learned Hand in *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950):

> "The justification . . . is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith."

Appendix A

B. Qualified Immunity from Suit on Federal Claims

The *fons et origo* of contemporary learning on qualified immunity is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Recognizing the "substantial costs" attendant upon litigation over the subjective good faith of government officials, *id.* at 816, the Supreme Court held in *Harlow* that entitlement to qualified immunity must be determined instead on a basis of objective legal reasonableness:

> "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a *reasonable person* would have known." *Id.* at 818 (emphasis supplied).

The statutory or constitutional rights in question must have been "so clearly established when the acts were committed that *any* officer in the defendant's position, *measured objectively*, would have *clearly* understood that he was under an affirmative duty to have refrained from such conduct." *Dominque v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (emphasis supplied) (citing *Anderson v. Creighton*, 483 U.S. 635 (1987)). "This 'objective reasonableness' standard focuses on whether defendants reasonably *could* have thought that their actions were consistent with the rights that plaintiff claims have been violated." *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993) (emphasis supplied) (citations omitted).

In the case at bar the district court concluded that the plaintiffs' complaint "sufficiently alleged that the defendants' acts were not in good faith, and in violation of clearly recognized constitutional rights." Memorandum Opinion at 21. As we have seen, however, an allegation of subjective lack of good faith cannot suffice to defeat qualified immunity. See also *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (allegation of malice will not alone defeat an official's claim

to qualified immunity). Under *Harlow v. Fitzgerald*, the test is an objective one: whether a hypothetical official, standing in the defendant's shoes, would necessarily have understood that taking the steps challenged by the plaintiff would violate the plaintiff's clearly established constitutional or statutory rights.

It is true, of course, that the right of Mr. Cullinan and Cullinan Associates to freedom of speech was clearly established, just as their rights not to be deprived of property without due process and not to be victimized by patterns of racketeering activity were clearly established. But the operation of the "objective legal reasonableness" standard "depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

> "For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*

"It is not determinative," in other words, "that the plaintiff has asserted the violation of a broadly stated general right." *Garvie v. Jackson*, 845 F.2d 647, 650 (6th Cir. 1988).

> "[O]ur cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*, quoting *Anderson v. Creighton*, 483 U.S. at 640 (citation omitted).

Garvie, as we had occasion to observe in *Guercio v. Brody*, 911 F.2d 1179, 1184 (6th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991), "clearly counsels the application of a fact-specific, as opposed to abstract, approach to qualified immunity questions."

The complaint and affidavit filed by the plaintiffs in the case at bar were commendably fact-specific. We are not persuaded that the facts need further "fleshing out" via expensive discovery proceedings; it seems to us that the papers already before the court present a reasonably clear picture of who the defendants are and what they are supposed to have done.

The district court thought the record unclear as to which defendants were acting as public officials. But the plaintiffs' papers leave no room for doubt that defendant Abramson was acting as the duly elected mayor of the City of Louisville, an office he assumed in January of 1986. Defendant Jay was acting as the city's director of finance and budget, a post he occupied from 1986 to 1992. (It is undisputed that Jay was functioning both as the finance director and as an *ex officio* member of the police pension fund board of trustees — and what counts, in our view, is the function; whether Jay was legally entitled to hold the offices he occupied is immaterial.) Defendant Unger was likewise acting as a city employee and *ex officio* member of the pension fund board, and no question has been raised as to the legality of Unger's tenure. Defendants Heavrin and Nevin also were city employees, and the complaint adds that Nevin was a retired city police officer and a beneficiary of the pension fund. Defendant GTB&M was a law partnership retained to represent the city in its litigation with the pension fund and the elected trustees, while the GTB&M lawyers actively engaged in the litigation on the

city's behalf, defendants Boone, Hinkle, and Halliday, were all acting as counsel for the city.

There is a legal question as to whether the "outside counsel" status of the GTB&M lawyers and their firm makes these defendants ineligible for qualified immunity. In *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988), a civil rights case brought by a shareholder against a private litigant who had secured a prejudgment attachment of the plaintiff's shares and who ultimately acquired title to the shares at a sheriff's sale, we held that private litigants are not eligible for immunity from suit under § 1983. We reached this conclusion because "private parties were [not] immune from suit at common law, and because the various rationales for good faith immunity are inapplicable to private parties. . . ." *Id.* at 1264. Mr. Cullinan and his firm cite *Duncan* for the proposition that "a private individual faced with a § 1983 claim has no immunities."

This is an accurate proposition in most factual contexts, but not here. As the Supreme Court recently had occasion to note, it appears that the common law "*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson v. McKnight*, 117 S. Ct. 2100, 2105 (1997) (citations omitted) (emphasis in original). As attorneys for the city, GTB&M *et al.* were clearly acting as the city's agents. The rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to defendant Heavrin, Louisville's sometime law director. We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel.

Another factor that the district court may have seen as militating against an early grant of qualified immunity to the appellants in the case at bar is that "a suit against [public officials] in their official capacity is actually a suit against the governmental entity," whereas "[c]laims against a public

official in his or her individual capacity seek to impose personal liability for actions taken under color of state law." Memorandum Opinion at 21. The court appears to have entertained doubts as to the capacity in which some or all of the appellants had been sued.

The plaintiffs' brief on appeal makes it clear that these "[d]efendants have been sued in their individual capacities." If the complaint was ambiguous on this point, it makes no difference for present purposes; an individual is not entitled to qualified immunity against an official-capacity claim, to be sure, but neither can he be held personally liable for damages on such a claim. The viability of the plaintiffs' lawsuit against the city itself is not at issue in the present appeal. All we are concerned with here is the question whether the appellants are entitled to qualified immunity from suit for damages insofar as liability is sought to be imposed on them in their individual capacities.

The defendants' entitlement to qualified immunity on the federal claims turns, as we have said, on the answer to the question whether reasonable officials/lawyers standing in the defendants' shoes would necessarily have known that in attempting to oust Cullinan as an investment manager for the Louisville police pension fund, and in bringing a retaliatory lawsuit which we must assume the city could not have won had the case gone to trial, they were violating Cullinan's rights under federal law. This question may not be answered in favor of the plaintiffs, of course, unless the federal rights claimed to have been violated were "clearly established" in the particularized sense required under the caselaw cited above.

Ordinarily, at least, in determining whether a right is "clearly established" this court will not look beyond Supreme Court and Sixth Circuit precedent. *Walton*, 995 F.2d at 1336. The district court cited two precedents — both Supreme Court cases — in support of the proposition that the rights

allegedly violated by the defendants here were "clearly established." We turn to these precedents now.

The first decision, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), involved a state court judgment against a number of black citizens of Claiborne County, Mississippi, who during the 1960s had tried to enforce demands for racial equality and integration by participating in a boycott of white merchants. The Supreme Court of Mississippi had upheld the judgment insofar as it rested on a finding of liability for malicious interference with the merchants' businesses. The United States Supreme Court reversed on First Amendment grounds, noting that the black citizens had "withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure." *Id.* at 918.

In the case at bar the district court relied on *Claiborne Hardware* to show that "[a] First Amendment right to speak freely on matters of public concern is well established." Memorandum Opinion at 22. As an abstract proposition, this is obviously true. When we reach the level of generality at which we are required to focus our analysis here, however, it is far from obvious to us that reasonable people standing in the shoes of the mayor of Louisville and his associates would have read *Claiborne Hardware* as establishing that the First Amendment (a) forecloses efforts to replace a pension plan money manager whose investment strategies run counter to those favored by the finance director of the city whose police officers are the beneficiaries of the plan, and (b) immunizes the money manager from retaliatory litigation.[8]

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[8]There is no consensus among the circuits as to whether a claim of malicious prosecution can support a § 1983 action. See *Braley v. City of Pontiac*, 906 F.2d 220, 226 and n.6 (6th Cir. 1990). Our court has recognized a cause of action under § 1983 for the false arrest and malicious criminal prosecution of a homeowner who resisted an unconstitutional search of his home by the police, see *Dunn v. State of*

Greene v. McElroy, 360 U.S. 474 (1959), the other decision cited by the district court, involved the discharge of an aeronautical engineer by a military contractor after the Department of Defense revoked the man's security clearance without having given him an opportunity to confront his accusers. The dispositive issue in the case, as the Supreme Court saw it, is one that has no relevance here:

> "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." *Id.* at 493.

Citing earlier authority, the *Greene* Court did note that "the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Id.* at 492. It is entirely correct to say, as the district court said here, that "the Supreme Court has recognized the right to be free from unreasonable actions by government officials which interfere with property interests." Memorandum Opinion at 22. But it is not correct, in our view, to conclude that Mr. Cullinan had a "clearly established" constitutional right not to be included as a defendant in the city's suit against the elected pension fund trustees. Neither is it correct to conclude that Messrs. Jay and Unger, the trustees who served on the pension fund board *ex officio*, were constitutionally barred from trying to persuade their fellow trustees to fire a money manager whose

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Tennessee, 697 F.2d 121 (6th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983), but, like *Claiborne County*, this seems rather remote from the present case.

covered call option writing strategy was considered, rightly or wrongly, to be ill-advised.

As far as the plaintiffs' RICO claim is concerned, it would unduly prolong an opinion that may already have tested the acceptable limits of prolixity if we were to explore in depth the arguments on which that claim rests. The arguments are ingenious, but we know of no Supreme Court or Sixth Circuit precedent that could properly be said to have informed the defendants that they could not do what they stand accused of doing without violating "clearly established" rights conferred on the plaintiffs by the RICO statute. As far as we are concerned, this ends the matter.

C. Immunity from Suit on State Claims

Whether, and to what extent, the defendants are immune from suit on the plaintiffs' pendent state law claims is a question that turns on state law, as does the appealability of the denial of immunity on the state law claims. See *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986); *Walton*, 995 F.2d at 1343.

We find it unnecessary, at this stage, either to review the merits of the district court's initial rulings on the state law immunity claims or to determine the appealability of those rulings. In light of our conclusion that the federal claims must be dismissed in their entirety, the district court may wish to exercise its discretion to dismiss the state law claims without prejudice. Alternatively, the district court may wish to revisit the substance of its initial rulings in light of our decision on the defendants' right to immunity from suit on the federal claims. (Although our decision is in no way binding insofar as the state law claims are concerned, state courts not infrequently look to federal law for guidance with respect to issues of state law.) The posture of the case now having undergone a rather considerable change, we think it appropriate to leave the next step to the sound discretion of the district court.

Appendix A

IV.

The order appealed from is **REVERSED** insofar as it denied the appellants' motions for dismissal of the federal claims on qualified immunity grounds, and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE ENTERED FEBRUARY 22, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 94-198-L(S)

R. KEITH CULLINAN and CULLINAN ASSOCIATES, INC.

PLAINTIFFS

v.

JERRY E. ABRAMSON, et al

DEFENDANTS

MEMORANDUM OPINION

Plaintiffs filed this action against ten defendants, alleging ten causes of action. Some counts are asserted against all defendants, while others name a specified few. Each defendant has now moved to discuss the amended complaint. Many of the asserted grounds for dismissal are shared and the defendants have found enough common ground for the filing of joint motions and wholesale adoption of arguments and briefs. Thus, currently before the court are five motions to dismiss covering every defendant and every cause of action.

On any dismissal motion made pursuant to Rule 12(b)(6),

we are required to accept all of the plaintiffs' allegations as true. *Vemco, Inc. v. Camardella,* 23 F.3d 129, 131 (6th Cir. 1994). We will not dismiss plaintiffs' amended complaint unless it appears beyond a doubt that plaintiffs can prove no set of circumstances which would entitled them to relief. *Id.*

I
THE PARTIES

Plaintiffs

Plaintiff, R. Keith Cullinan ("Cullinan"), is an investment manager. From 1974 until January, 1990, he was Executive Vice-President in Charge of the Trust Department at Stock Yards Bank and Trust Company. Since that time, he has been an employee of plaintiff, Cullinan Associates, Inc.

Plaintiff, Cullinan Associates, Inc. ("Cullinan Associates"), is an investment management firm incorporated under the laws of Kentucky. It receives fees for its services, generally set at a percentage of assets under management. Plaintiff Cullinan has been President and Chief Executive Officer of Cullinan Associates since January, 1990.

Defendants

At all times pertinent to the allegations of the amended complaint:

Defendant, Jerry E. Abramson ("Abramson"), was serving as the Mayor of the City of Louisville.

Defendant, City of Louisville ("City"), was a municipal corporation subject to the statutes of the Commonwealth of Kentucky.

Appendix B

Defendant, Christina Heavrin ("Heavrin"), was the Director of Law for the City of Louisville.

Defendant, Stuart P. Jay ("Jay"), was the Director of Finance and Budget for the City of Louisville.

Defendant, Earl M. Unger ("Unger"), was the Executive Administrator of Finance and Budget for the City of Louisville.

Defendant, John H. Nevin ("Nevin"), was a retired city officer and beneficiary of the Policeman's Pension Fund.

Defendant, Greenebaum, Treitz, Brown and Marshall ("GTBM"), was a Kentucky general partnership engaged in the practice of law.

Defendant, William C. Boone ("Boone"), was a partner in the law firm of GTBM.

Defendant, Samuel D. Hinkle ("Hinkle"), was a partner in the law firm of GTBM.

Defendant, Culver V. Halliday ("Halliday"), was an employee in the law firm of GTBM.

HISTORY OF THE PARTIES' LITIGATION

This action represents another chapter in what appears to be a never-ending saga over plaintiffs' management of the Policeman's Retirement Fund of the City of Louisville (the "Fund"). To fully comprehend the complexities of the current litigation, it is necessary for us to review the parties' historical feuding.

Plaintiff Cullinan was hired by the Fund in 1977 to manage a small percentage of its assets. At the time of his initial hiring,

Appendix B

Cullinan was an employee of Stock Yards Bank and Trust Company ("Stock Yards"). As the years progressed, the percentage of the Fund's assets allocated to Cullinan for management increased. By the time Cullinan established his own company, plaintiff Cullinan Associates, in January, 1990, he was in charge of managing a significant share of the Fund.

In 1986, the City transferred several million dollars of what it called "excess funds" away from the Fund. It was Cullinan's perception that this action by the City was improper, and he urged the Fund's trustees to contest the City's action. Eventually, in 1989, the Fund heeded Cullinan's call and brought suit against the City alleging that its removal of monies from the Fund was illegal ("Suit No. 1").

On April 19, 1990, the City countered by filing an action against the Fund and its five elected trustees personally ("Suit No. 2"). Suit No. 2 alleged that the plaintiffs had mismanaged fund assets by engaging in deceitful, fraudulent, and illegal transactions. When Suit No. 2 was dismissed for lack of standing, defendant Nevin brought an identical suit against the plaintiffs ("Suit No. 3").[1]

In 1992, the Fund's Board of Trustees filed another action against the City ("Suit No. 4"). Suit No. 4 challenged the City's method of valuing assets for purposes of determining the

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1. The trial court found that the City of Louisville lacked standing to challenge plaintiffs' actions. Therefore, Nevin, as a beneficiary of the Fund, brought an identical suit to meet the standing requirement. Eventually, the Kentucky Supreme Count held that the City did have standing to bring Suit No. 2, and it was consolidated with Suite No. 3. *See, Louisville v. Stock Yards Bank and Trust,* 843 S.W.2d 327 (Ky. 1992).

amount of distributions to be made to the Fund. The Fund then sued the City and Heavrin asserting that Heavrin improperly refused to pay the Fund's attorney's fees ("Suit No. 5"). Finally, the Fund challenged the amount of monies turned over to it for management ("Suit No. 6").

Five of the above mentioned lawsuits are currently pending in Jefferson Circuit Court. One is on appeal to the Sixth Circuit. Of particular import to this action is the consolidated litigation of Suit Nos. 2 and 3. While that litigation remains pending, several of its claims which bear substantially on the litigation before this court were dismissed.

Suit Nos. 2 and 3 were brought by the City against Stock Yards, Cullinan Associates, Cullinan, Shearson Lehman Hutton, Inc., and numerous other individuals. The City's complaint essentially consisted of allegations that Stock Yards, Cullinan and Shearson Lehman had violated their fiduciary duties by charging and permitting excessive fees and commissions for their services.

Stock yards eventually entered into a settlement agreement with the City. In return for payment of $175,000.00, the City agreed to dismiss all claims against Stock Yards and to dismiss Cullinan and Cullinan Associates from the lawsuit. The remaining parties were not released, and Suit Nos. 2 and 3 remain pending as to them.

THIS LITIGATION

Plaintiffs' amended complaint sets forth numerous allegations. As previously stated, it consists of ten counts. The pertinent allegations relating to each individual count are

discussed below. While broadly accusatory, plaintiffs' amended complaint generally centers around defendants' conduct in relation to Suit Nos. 2 and 3.

Plaintiffs state that the events giving rise to this litigation followed defendant Abramson's election to office in 1986. It was Abramson who initiated the transfer of the "excess funds" and appointed defendant Jay, whom plaintiffs describe as a long-time opponent of their investment strategy. Jay's appointment entitled him to a position on the Fund's Board of Trustees. Plaintiffs assert that Jay, along with defendant Unger, immediately campaigned to have Cullinan fired as one of the Fund's money managers. When the board's elected trustees would not acquiesce in Jay's demands, plaintiffs allege that all of the defendants embarked on a conspiracy of threats, bribery, extortion, and coercion in an all-out attempt to have Cullinan terminated.

Following the filing of Suit No. 1, plaintiffs state that defendants threatened to retaliate with Suit Nos. 2 and 3, if the board's trustees did not dismiss Suit No. 1 and terminate Cullinan. The threats of retaliation were then followed by attempts of bribery and coercion, *i.e.*, plaintiffs allege that defendants offered to share with the board any monies recovered from Suit No. 2, and to relieve them of any expenses incurred. Plaintiffs also claim that defendants attempted to affect the board's decision making by threatening to accuse the trustees of criminal activity.

When the board refused to accede to their demands, Suit Nos. 2 and 3 were filed. Both suits, which plaintiffs claim were groundless, false and misleading, received widespread publicity. Plaintiffs allege that following the filing of Suit Nos. 2 and 3, defendant City, acting through defendant Heavrin, refused to

honor its obligation to provide counsel to and/or indemnify the Fund's elected trustees in their defense of Suit Nos. 2 and 3.

Plaintiffs' amended complaint asserts that defendants' coercive actions were never-ending. It is alleged that monies appropriated to the Fund were not turned over, and the payment of bonuses to Fund beneficiaries was blocked.

In sum, the amended complaint details numerous actions by defendants designed to silence Cullinan, terminate his relationship with the Fund, and further damage his business and reputation. Plaintiffs conclude by stating:

> The actions taken by defendants were part of a scheme to accomplish various objectives, including but not limited to: a desire to prevent a suit by Louisville Firefighters to recover approximately $20 million in "excess funds" taken by the City; a desire to have the City, not the Fund Trustees, control the management of the assets remaining in the Fund; a desire to silence all opposition to the City's efforts to take actions that Plaintiffs Cullinan and Cullinan Associates and others believed would not be in the best interests of the Fund and its beneficiaries, including the taking of the "excess funds;" a desire to discredit the elected Fund Trustees by trying to force them to violate their fiduciary duties to the Fund and its beneficiaries; a desire to influence the Fund beneficiaries to remove the elected Trustees; a desire to thwart efforts to cause improvements to be made in the benefits available to the beneficiaries of the Fund; a desire to remove Plaintiffs as investment manager of a part of the Funds assets; a desire to

substitute investment managers and brokers and consultants and investment strategies of the City's choice for those duly selected by the Fund's Trustees; a desire to replace Plaintiff Cullinan with a money manager selected by certain of Defendants who would be a friend and/or political associates of said Defendants or Defendant Abramson; a desire to cause changes in the asset allocation of the Fund's investments despite statutory prohibition of such actions; a desire on the part of Defendants Boone, Hinkle, Halliday and GTBM to obtain fees through no-bid personal service contracts awarded by Defendant City in concert with Defendants Abramson, Jay and Heavrin.

The amended complaint sets forth the following counts:

Count I: RICO (asserted against all defendants other than the City of Louisville)

Count I asserts civil RICO violations against all defendants. The City and GTBM are alleged to be enterprises through which defendants violated various provisions of 18 U.S.C. § 1962.

Count II: Wrongful Use of Civil Proceedings (asserted against all defendants)

Count II asserts that all defendants have taken part in the initiation of litigation against plaintiffs without probable cause, for a primary purpose other than that of securing the proper adjudication of the stated claim, and that the proceedings terminated in plaintiffs' favor.

Appendix B

Count III: Abuse of Process (asserted against all defendants)

Count III sets forth a claim for abuse of process. Plaintiffs' amended complaint states that all defendants participated in the employment of legal process for purposes other than that for which it was intended to effect.

Count IV: § 1983 Civil Action for Deprivation of Constitutional Rights (asserted against all defendants)

Count IV alleges that the actions of defendants subjected plaintiffs to a deprivation of rights, privileges and immunities secured by the Constitution in violation of 42 U.S.C. § 1983. Specifically, plaintiffs complain of improper interference with (1) their right to speak freely and (2) their right not to be deprived of property without due process of law.

Count V: Interference with Prospective and Actual Contractual Relationships (asserted against all defendants)

Count V states that defendants' actions have induced or caused former or prospective clients of the plaintiffs to either not continue to fail to enter into contractual relationships with plaintiff.

Count VI: Punitive Damages (asserted against all defendants other than the City)

Count VI asserts that defendants' actions have been in willful, wanton, and callous disregard of plaintiffs' rights. Plaintiffs claim a right to punitive damages for such actions.

Appendix B

Count VII: Indemnity (asserted against the City of Louisville)

Count VII asserts that defendant City is required to indemnify some or all of the defendants for some or all of plaintiffs' claims.

Count VIII: Damages for Violations of Miscellaneous Statutes (asserted against defendants Jay, Unger, and Heavrin)

Count VIII alleges that the actions of defendants Jay, Unger, and Heavrin constituted "Official Misconduct in the First Degree" in violation of KRS 522.020. The alleged misconduct consisted of the following:

(1) The efforts of defendants Jay and Unger to terminate plaintiffs' business relationship with the Fund,

(2) The refusal of defendant Heavrin to provide indemnity to the Fund's elected trustees,

(3) Defendant Heavrin's purported indemnification of defendant Nevin, and

(4) Defendant Jay's refusal to transfer to the Fund monies appropriated it by the Board of Aldermen.

Appendix B

Count IX: Outrageous Conduct Causing Severe Emotional Distress (asserted against all defendants)

Count IX alleges that defendants' actions have been extreme and outrageous, intentionally or recklessly causing Cullinan severe emotional distress.

Count X: Defamation (asserted against defendants City and Abramson)

Count X sets forth a defamation claim based on defendants' issuance of several statements.

Therein lies the grounds upon which plaintiffs' amended complaint rests. Currently before the court are defendants' motions to dismiss. While defendants assert numerous grounds for dismissal, they principally claim immunity, absolute or qualified, and that plaintiffs' amended complaint fails to state a claim upon which relief can be granted. We now undertake to examine each count along with the asserted grounds for dismissal.

ABSOLUTE IMMUNITY

Under various theories, defendants claim they are entitled to absolute immunity on all claims asserted by the plaintiffs. In the alternative, defendants argue for dismissal on the basis that they have qualified immunity.

Appendix B

A. Absolute Immunity on the Section 1983, Abuse of Process, and Wrongful Use of Civil Proceedings Claims.

We initially note that pursuant to *Monell v. Dept. of Soc. Serv. of City of N. Y.*, 436 U.S. 658, 98 S. Ct. 2018 (1978), and *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S. Ct. 1398 (1980), the City of Louisville has no immunity under Section 1983. A municipality may not allege immunity from its constitutional violations, nor may it assert the good faith of its officials as a defense to such liability. *Owen*, 445 U.S. at 638.

The remaining individual defendants claim absolute immunity for the performance of certain "discretionary acts." Particularly, defendants argue that in initiating legal proceedings against the plaintiffs (Suit Nos. 2 and 3), they were performing functions analogous to those of a prosecutor. Just as a prosecutor enjoys absolute immunity for initiating a criminal prosecution, defendants claim immunity for their actions taken in a "quasi-prosecutorial" role.

Absolute immunity provides a complete bar to civil liability and eliminates the need for public officials to prove they acted reasonably. *Imbler v. Pachtman*, 424 U.S. 409, 419 n. 13, 96 S. Ct. 984 (1976). The Supreme Court first recognized absolute immunity to Section 1983 damages in *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783 (1951). In *Tenney*, absolute immunity was granted to state legislators performing legislative functions. *Id.* The Court's reasoning was twofold. First, at the time Congress passed Section 1983, state legislators had historically enjoyed absolute immunity. *Id.* at 376. Second, the statute's language and legislative history failed to indicate congressional intent to abrogate this immunity. *Id.*

Appendix B

In 1967 and 1976, the Court extended absolute immunity to the judicial and prosecutorial spheres. *See Pierson v. Ray,* 386 U.S. 547, 87 S. Ct. 1213 (1967); *Imbler,* 424 U.S. 409. In both cases, the Court fully complied with *Tenney's* two-pronged analysis. These absolute immunities were (1) firmly established in the common law and (2) there was no indication Congress desired to diminish such immunity. *Pierson,* 386 U.S. at 554; *Imbler,* 424 U.S. at 424. The rationale behind absolute immunity for legislators, judges, and prosecutors acting within the scope of their duties was universal: "[the] concern that harassment by unfounded litigation would cause a deflection of the [Public official's] energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by this public trust." *Imbler,* 424 U.S. at 423.

The Supreme Court has recognized that absolute immunity may be extended not only to legislators, judges, and prosecutors, but also to those performing quasi-legislative, judicial, or prosecutorial roles. *See Imbler,* 424 U.S. at 424-25; *Lake Country Estates v. Tahoe Regional Planning Agency,* 440 U.S. 391, 405, 99 S. Ct. 1171 (1979); *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894 (1978). Defendants claim to have acted as quasi-prosecutors in initiating litigation against the plaintiffs. We now turn our attention to those decisions addressing prosecutorial and quasi-prosecutorial immunity. We also look to see the extent to which defendants can be said to have performed essentially prosecutorial functions.

The *Imbler* decision represented the Court's initial delineation of Section 1983 liability for a state prosecutor. The Court found that at common law state prosecutors were absolutely immune for actions and decision made within the scope of duty. *Imbler,* 424 U.S. at 422-23. The Court expressed the concerns behind such immunity:

Appendix B

> The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case. . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterize the administration of this office. The work of the prosecutor would thus be impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.

Id. at 423-24 (quoting *Pearson v. Reed,* 6 Cal. App. 2d 277, 287, 44 P.2d 592, 597 (1935)).

With absolute immunity well settled at common law, the Court found nothing in Section 1983 which could be interpreted to abrogate such immunity. *Imbler,* 424 U.S. at 424. Although the Court recognized that absolute immunity left the genuinely wronged without redress, this was deemed a lesser evil than subjecting those who did do their duty to the constant fear of retaliation. *Id.* at 428. However, the Court was careful to limit its holding to the following: "[I]n initiating a prosecution and in presenting the state's case, the prosecutor is immune from a civil suit for damages under § 1983." *Id.* at 431.

Appendix B

Most recently, the Supreme Court addressed prosecutorial immunity in *Burns v. Reed,* 111 S. Ct. 1934 (1991), and *Buckley v. Fitzsimmons,* 113 S. Ct. 2606 (1993). In each of those cases, the Court considered whether the absolute immunity recognized in *Imbler* applied to particular prosecutorial functions. In *Burns,* the Court considered whether *Imbler* immunity applied to a prosecutor's (a) participation in a probable cause hearing and (b) giving legal advice to the police regarding the propriety of hypnotizing a criminal subject. The Court found that while the prosecutor was absolutely immune for his actions in the probable cause hearing, he was but qualifiedly immune for giving legal advice to the police. *Burns,* 111 S. Ct at 1944-45. The rationale being that while a prosecutor should enjoy absolute immunity for all actions connected with his role in judicial proceedings, such immunity should not extend to every litigation-inducing conduct. *Id.* at 1943.

Likewise, the *Buckley* Court considered Section 1983 immunity in the face of allegations that prosecutors allegedly fabricated evidence during the investigation of a crime and then made false statements at a press conference announcing the indictment. The Supreme Court found that absolute immunity did not attach to such conduct. *Buckley,* 113 S. Ct. at 2619. If immunity attached at all, it was qualified and not absolute. *Id.* at 2618.

While defendants cite to *Burns* and *Buckley,* we do not find either opinion particularly instructive. In both cases, the Court was confronted with defining the contours of immunity for state employed district attorneys engaged in *criminal* prosecutions. Despite defendants argument that their conduct was analogous to that of a prosecutor, the facts in *Burns* and *Buckley* are clearly distinguishable.

We do, however, glean some important principles from those opinions. As previously noted, these cases solidify the legal framework for determining Section 1983 immunities. Further, the decisions recognize that most officials are entitled only to qualified immunity. *Buckley,* 113 S. Ct. at 2613; *Burns,* 111 S. Ct. at 1944. Qualified immunity is seen as sufficient to "protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Buckley,* 113 S. Ct. at 2613 (quoting *Butz v. Economou,* 438 U.S. 478, 506, 98 S. Ct. 2894, 2911 (1978)). In sum, the Supreme Court has been "quite sparing" in recognizing and extending the doctrine of absolute immunity for state actors. *Id.*

Defendants principally rely upon *Butz v. Economou,* 438 U.S. 478, 98 S. Ct. 2894 (1978), and *Spear v. Town of West Hartford,* 954 F.2d 63 (2d Cir. 1992). *Butz* addressed the extent of personal immunity for federal officials in the executive branch. In *Butz,* a former registered futures merchant brought an action against the Department of Agriculture and its officials for damages on the ground that the Department had wrongfully initiated administrative proceedings against him and his company. The merchant claimed that following his criticism of the Department and its staff, the Department initiated administrative proceedings to revoke or suspend his company's registration. The amended complaint presented some ten causes of action, including a claim for damages under 42 U.S.C. § 1983.

The Court extended absolute immunity to the agency officials in the Department of Agriculture. *Id* at 512-13. The Court found that adjudication within a federal agency contained many similarities to adjudication within the judicial process.

Id. The Court noted that the role of an administrative law judge was "functionally comparable" to that of a judge, and that agency officials were seen as quasi-prosecutors:

> We also believe that agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts. The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought.

Id. at 515.

We are not persuaded that *Butz* is authority for granting absolute immunity to the defendants in the current litigation. Absolute immunity is the exception rather than the rule. *Buckley,* 113 S. Ct. at 2613. The official seeking absolute immunity bears the burden of showing such immunity is justified. *Forrester v. White,* 484 U.S. 219, 224, 108 S. Ct. 538 (1988). The presumption is in favor of qualified immunity being sufficient to protect public officials in the exercise of their functions. *Id.* at 224. Extension of the doctrine of absolute immunity is rare. *Harlow v. Fitzgerald,* 457 U.S. 800, 811, 102 S. Ct. 2727 (1987).

While the Supreme Court has recognized absolute immunity for those exercising quasi-prosecutorial functions, the Court has never extended the doctrine to encompass the activities

engaged in by the current defendants. *Butz* addressed the unique situation of actions taken by an administrative agency. The *Butz* Court found that an agency's functions were remarkably similar to those of a judge and prosecutor. *Butz,* 98 S. Ct. 2914. Federal administrative law required that agency adjudication provide many of the procedural safeguards found in judicial process. *Id.* The proceedings were adversarial in nature and were conducted before an unbiased trier of fact. *Id.* Each party was entitled to present evidence and form a record for decision. *Id.* Therefore, the Court had little trouble in extending judicial immunity to the administrative law judge and prosecutorial immunity to agency officials. *Id.* We note that the *Butz* opinion represents the Supreme Court's furthest extension of absolute immunity.

In the current litigation, defendants are not prosecutors nor agency of officials. Their initiation of litigation against plaintiffs can hardly be said to be of the same nature as the actions of the Department of Agriculture officials in *Butz.* The officials in *Butz* were granted statutory authority to investigate violations of agency regulations. *Id.* at 2915. A wide range of discretion was given such officials in their determination of whether to initiate proceedings. *Id.* The *Butz* Court simply found that administrative enforcement proceedings were highly analogous to criminal prosecutions. "The key point is that administrative personnel, like prosecutors, 'often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence.' " *Id.* at 2916 n. 40 (quoting *Imbler,* 424 U.S. at 426 n. 24).

Most importantly, in determining whether particular actions of government officials are entitled to absolute or qualified immunity, we must use a "functional approach." *Buckley,* 113

S. Ct. at 2613. Such an approach looks to "the nature of the function performed, not the identity of the actor who performed it." *Id.* (quoting *Forrester,* 484 U.S. at 229). In this case, the nature of defendants' litigation against plaintiffs was in the form of an indemnity action. *See Louisville v. Stock Yards Bank & Trust,* 843 S.W.2d 327 (Ky. 1992). Defendants' suit against the plaintiffs claimed potential financial responsibility of the City for Cullinan's alleged mismanagement of funds. The tenor of the lawsuit is an attempt to protect the fisc of the City. Such is hardly in the nature of any prosecutorial, judicial or legislative function for which the Supreme Court has granted absolute immunity.

Defendants' argument for absolute immunity then solely rests upon *Spear v. Town of West Hartford,* 954 F.2d 63 (2d Cir. 1992). In *Spear,* the Second Circuit granted absolute immunity to two public officials who authorized a lawsuit which named John Spear as a defendant. *Id.* at 66-67. The City's lawsuit was brought for the purpose of prohibiting illegal protest activities. Spear was subsequently dismissed following the filing of an amended complaint. He brought a Section 1983 claim against the town and its officials for allegedly violating his First Amendment rights. The court held that the city officials were absolutely immune from liability for initiating the prior civil litigation.

We find *Spear* distinguishable from the current action in two important respects. First, the action of the city officials in *Spear* was arguably much more in the nature of a criminal prosecution. *See Canell v. Oregon Dept. of Justice,* 811 F. Supp. 546, 552 n. 7 (D. Or. 1993). In *Spear,* the "function" of the City's suit was to keep the peace, not to protect the City's fisc. Second, the city officials in *Spear* were acting pursuant to a

legislative directive to initiate the lawsuit in question. Defendants in this case were under no such legislative mandate.

For the foregoing reasons, we will deny defendants' motion to dismiss the Section 1983, wrongful use of civil proceedings and abuse of process claims based on absolute immunity.

B. Absolute Immunity on RICO Claims

Defendants also assert absolute immunity on plaintiffs' RICO claims. As sole support for such immunity, defendants cite *Connor v. City of Philadelphia,* 1991 U.S. Dist. LEXIS 8058 (E.D. Penn. 1991). Defendants reason that as they must have license to prosecute and protect the City's interest, they are entitled to absolute immunity on all RICO claims.

Connor addressed a RICO claim asserted by Matthew Connor, who had been convicted of raping and murdering a twelve-year-old girl and sentenced to life in prison. After almost twelve years in prison, a re-investigation by the district attorney's office led to the dismissal of all charges against Mr. Connor. Connor's RICO claims alleged that the prosecutor's office obtained his conviction through the knowing presentation of fraudulent evidence.

The district judge dismissed Connor's complaint as it pertained to the state's prosecutor who obtained his conviction. *Id.* at *15. Having found no authority on the issue of prosecutorial immunity to RICO claims, the court found that the rationale granting prosecutors absolute immunity on Section 1983 claims should be extended to cover RICO claims. *Id.* at *18.

While *Connor* may be a well-reasoned decision, it certainly

does not stand for the proposition that absolute immunity should be extended to cover the RICO claims in this litigation. Once again, defendants have relied on a case which addressed the immunity of a state's prosecutor in a criminal action. In the foregoing section, we stated our reasons for finding that defendants were not acting in any prosecutorial or quasi-prosecutorial role. For the reasons previously stated, we likewise decline to dismiss the RICO claims based on absolute immunity.

C. Absolute Immunity on State Law Claims

1. Defendants' Claim of Immunity Under KRS 65.2003

Defendants claim they are absolutely immune from all state law claims by virtue of KRS 65.2003(3).

KRS 65.2003(3) provides:

> Notwithstanding KRS 65.2001, a local government shall not be liable for injuries or losses resulting from:
>
> (3) Any claim arising from the exercise of judicial, quasi-judicial, legislative or quasi-legislative authority or others, exercise of judgment or discretion vested in the local government, which shall include by example, but not limited to:
>
> (a) The adoption or failure to adopt any ordinance, resolution, order, regulation, or rule;
>
> (b) The failure to enforce any law;

> (c) The issuance, denials, suspension, revocation of, or failure or refusal to issue, deny, suspend or revoke any permit, license, certificate, approval, order or similar authorization;
>
> (d) The exercise of discretion when in the face of competing demands, the local government determines whether and how to utilize or apply existing resources; or
>
> (e) Failure to make an inspection.
>
> Nothing contained in this subsection shall be construed to exempt a local government from liability for negligence arising out of acts or omissions of its employees in carrying out their ministerial duties.

Defendants assert that all state law claims arise directly out of their exercise of quasi-judicial authority. We do not agree. Kentucky has adopted BLACK'S LAW DICTIONARY'S definition of "quasi-judicial." *Bolden v. City of Covington,* 803 S.W.2d 577, 581 (Ky. 1991). As set out in *Bolden,* the area of activity covered by the term "quasi-judicial" is defined as follows:

> **Quasi-Judicial** — A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature.

Id.

Just as defendants' acts are not quasi-prosecutorial, neither are they quasi-judicial. The courts of Kentucky have determined that quasi-judicial functions are those of a "regulatory" type. *Gas Service Co., Inc. v. City of London,* 687 S.W.2d 144, 149 (Ky. 1985). Regulatory functions include "the holding of hearings, the weighing of evidence, or the exercise of judicial discretion and adjudication of parties' rights." *Ashby v. City of Louisville,* 841 S.W.2d 184, 188 (Ky. App. 1992).

In this case, defendants' actions were not of a regulatory nature. None of the indicia of quasi-judicial activity, such as the taking of evidence or holding of hearings, was present. Further, defendants had no adjudicatory power and were not acting as an administrative agency. We must keep in mind that immunity to liability is a "narrow and limited" exception to the normal rule. *Bolden v. City of Covington,* 803 S.W.2d 577, 581 (Ky. 1991). Typically, the granting of quasi-judicial immunity occurs in cases where the government is not charged with causing the injury, but rather with having failed to prevent it through the proper exercise of regulatory functions. *Gas Service,* 687 S.W.2d at 149.

Defendants do not fit within this narrow exception to the general rule. Therefore, we will deny defendants' motion to dismiss based on KRS 65.2003(3).

2. Mayor Abramson's Claim of Absolute Immunity on the Defamation Claims

The crux of plaintiffs' defamation claims and the defenses to those claims is discussed later. However, we will briefly touch upon defendant Abramson's argument that he is absolutely immune to any defamation claim.

Appendix B

Abramson principally relies upon *Compton v. Romans*, 869 S.W.2d 24 (Ky. 1993), which he purports "greatly expands the reach of absolute immunity." *Compton* addressed a press release issued during an investigation by the chairman of the Kentucky State Racing Commission. The press statement allegedly defamed several individuals for their part in fixing a horse race. The Kentucky Supreme Court found the chairman absolutely immune from such a suit. *Id.* at 28.

We do not feel *Compton* affords Abramson unqualified relief from plaintiffs' defamation claims. The *Compton* court recognized that in Kentucky absolute immunity from defamation actions was available to certain governmental officials with respect to matters upon which the law required them to act. *Id.* at 26. The longstanding rule has been that "the absolute privilege applies whenever the communication is made in discharge of a duty under express authority of law by or to the heads of executive departments, provided the libelous communication is pertinent to the inquiry under investigation at the time." *Id.* (quoting *McAlister & Co. v. Jenkins*, 284 S.W. 88, 91 (Ky. 1926)).

The alleged remarks of Abramson were not made in discharge of a duty under express authority of law, nor was he the head of an executive department conducting an investigation. It is clear to this court that the doctrine of absolute immunity from defamation claims was designed to protect public officials with quasi-judicial powers or duties. We have already held that none of the defendants were acting quasi-judicially. The *Compton* court found that the chairman of the racing commission was acting under a broad grant of regulatory power. *Id.* Such is not the case in the current litigation. Abramson is not entitled to dismissal of plaintiffs' defamation claims on the basis of absolute immunity.

Appendix B

3. Defendants' Claim of Absolute Immunity for Exercising Discretion in Protecting the Public Welfare

Defendants cite at length numerous cases discussing the discretionary function exception to the Federal Tort Claims Act ("FTCA"). Since under the FTCA immunity is granted for the performance of certain discretionary functions, defendants claim the same should apply in this case.

We do not feel it is necessary to discuss the FTCA. This case does not fall under the FTCA and any interpretations of that Act are not controlling. Nevertheless, we recognize that in certain situations, public officers may be immune from liability for the exercise of "discretionary" functions. *See Thompson v. Huecke*, 559 S.W. 2d 488 (Ky. App. 1977); *Gould v. O'Bannon*, 770 S.W.2d 220 (Ky. 1989). However, there are several reasons why, at this juncture, we are unable to determine whether such immunity is appropriate. First, we do not know the capacity in which each defendant acted. While some are clearly public officials, others are not. Kentucky has adopted the RESTATEMENT (SECOND) OF TORTS § 895D(3) in distinguishing between discretionary actions, which may be entitled to immunity and ministerial actions, which are not. *Thompson*, 559 S.W.2d at 496. The RESTATEMENT provides a list of factors to be considered in making this distinction. These factors currently cannot be analyzed.

Therefore, defendants' motion to dismiss based on a discretionary function exception to liability will be denied.

Appendix B

QUALIFIED IMMUNITY

Having failed in establishing their entitlement to absolute immunity, defendants next seek dismissal based on qualified immunity. Defendants claim they have "qualified immunity from any claim of damages, including the claim for money damages for violation of 42 U.S.C. Section 1983."

As previously discussed, most public officials are entitled to qualified immunity rather than absolute immunity. *Buckley,* 113 S. Ct. at 2613. Qualified immunity insulates public officials from liability for their discretionary acts when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S. Ct. 2727 (1982). This immunity is generally seen as sufficient to protect public officials in the exercise of their discretion. *Buckley,* 113 S. Ct. at 2613.

Qualified immunity is based on the following four factors: (1) whether defendants were acting as public officials, (2) the capacity of each defendant (individual v. official), (3) whether defendants acted in good faith, and (4) whether defendants violated clearly recognized constitutional rights. *See Hafer v. Melo,* 112 S. Ct. 358 (1991); *Scheuer v. Rhodes,* 416 U.S. 232, 94 S. Ct. 1683; *Harlow v. Fitzgerald,* 457 U.S. 800, 102 S. Ct. 2727 (1982). Without further discovery into the status and actions of each defendant, we cannot presently determine as a matter of law whether some, or all, of the defendants are entitled to qualified immunity for some, or all, of their actions.

First, the current record is unclear as to which defendants were acting as public officials. While there is authority for the proposition that, in certain circumstances, private individuals

may assert governmental immunity defenses, the record inadequately reflects each defendant's status. *See Frazier v. Bailey,* 957 F.2d 920, 929 (1st Cir. 1992) (individuals under contract with the government are entitled to raise qualified immunity defense as they are functionally equivalent to public officials); *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.* 844 F.2d 714, 721 (10th Cir. 1988) (where government contract required party to act in certain manner, qualified immunity should be extended to private party defendants). *But see, Duncan v. Peck,* 844 F.2d 1261, 1264 (6th Cir. 1988) (strong policy reasons justify not extending official immunity to private actions).

Second, assuming some defendants were public officials, a suit against those individuals in their official capacity is actually a suit against the governmental entity. *Hafer,* 112 S. Ct. at 361. The only immunities available to a defendant in an official capacity action are those available to the governmental entity. *Id.* at 362. Claims against a public official in his or her individual capacity seek to impose personal liability for actions taken under color of state law. *Id.* Such claims can cover both (1) actions taken by a public official outside the official's authority and not essential to governmental operation and (2) actions within an official's authority and necessary to governmental function. *Id.* at 363. Various immunity defenses can be asserted by the public official in such situations.

It is well settled that in a civil rights action, the complaint should set forth facts which establish a violation of clearly established law. *Cameron v. Seitz,* 1994 U.S. App. LEXIS 29322 (6th Cir. Oct. 21, 1994). "Failure to do so, however, is not fatal; the district court should allow the plaintiff an opportunity to come forward with additional facts or allegations showing that rights were violated and that those rights were clearly established." *Id.* at *21.

Appendix B

In this action, plaintiffs have sufficiently alleged that the defendants' acts were not in good faith, and in violation of clearly recognized constitutional rights. Among other claims, plaintiffs allege that their rights to free speech and to the enjoyment of their property and liberty interests were violated. Particularly, they claim that defendants' actions were retaliatory in nature and designed to silence their objections to defendants' actions regarding the pension fund. Plaintiffs further claim that the defendants regularly and continuously interfered with their property interests, *i.e.*, their right to freely conduct a business relationship with the pension fund.

Plaintiffs' allegations are sufficient to survive a motion to dismiss. A First Amendment right to speak freely on matters of public concern is well established. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409 (1982). Likewise, the Supreme Court has recognized the right to be free from unreasonable actions by government officials which interfere with property interests. *Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400 (1959).

Therefore, we must deny defendants' motion to dismiss based on qualified immunity. However, such a ruling principally rests on the lack of evidence in the record at this juncture. This is not to say that some or all of the defendants are not entitled to qualified immunity on plaintiffs' claims. It is simply this court's conclusion that the status and actions taken by each defendant need further fleshing out. Dismissal on the basis of qualified immunity is typically granted at the summary judgment level. *See Harlow*, 457 U.S. at 808 (claims for damages based on constitutional violations need not proceed to trial, but can be disposed of on summary judgment); *Scheuer v. Rhodes*, 416

U.S. at 250 (where pleadings place in issue the capacity in which state officials acted and their good faith, further proceedings by way of summary judgment or trial are required). The Sixth Circuit has recognized as much:

> Since qualified immunity "is effectively lost if a case is erroneously permitted to go to trial" . . . the doctrine has been formulated in such a way as to allow insubstantial claims to be dismissed early in the litigation, such as by *summary judgment*, thereby protecting officials from the costs of trial and the burdens of litigation. (emphasis added).

Poe v. Haydon, 853 F.2d 418, 424 (6th Cir. 1988) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526-27, 105 S. Ct. 2806 (1985)).

Therefore, defendants' motion to dismiss based on qualified immunity will be denied.

RICO (COUNT I)

Plaintiffs' first claim alleges civil RICO violations pursuant to 18 U.S.C. § 1962. The RICO statute defines four categories of prohibited activities, all of which plaintiffs allege. Pertinent to this action, those sections read:

> (a) It shall be unlawful for any person who has received any income, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or in the establishment or operation of,

> any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962.

Plaintiffs' amended complaint sets forth the RICO allegations as follows:

Appendix B

RICO SECTION #	DEFENDANTS	COMPLAINT ¶	ENTERPRISE
§ 1962(a)	Boone, Hinkle, GTBM	97	GTBM
§ 1962(b)	Boone, Hinkle, GTBM	98	GTBM
	Abramson, Jay, Unger, Heavrin	100	CITY
§ 1962(c)	Boone, Hinkle, GTBM	99	GTBM & CITY
	Abramson, Jay, Unger, Heavrin, Halliday	101	CITY
§ 1962(d)	Abramson, Jay, Unger, Heavrin, Boone, Hinkle, Halliday, and Nevin	102	

The defendants make several arguments in support of dismissal. First, defendants claim that as a matter of law there is no "pattern" of racketeering activity. Alternatively, they argue for dismissal of all claims based on subsections (a), (b), (c), and (d) individually. Finally, they contend that plaintiffs have failed to adequately allege any RICO predicates.

The RICO statute broadly defines "racketeering activity" to include (1) any act or threat involving specified state-law crimes, (2) any act indictable under certain federal statutes, and (3) any number of identified federal offenses. 18 U.S.C. § 1961(1). The term "pattern" is more succinctly defined as requiring "at least two acts of racketeering activity within a ten year period." 18 U.S.C. § 1961(5).

Plaintiffs rely on a number of underlying predicate acts to establish a "pattern of racketeering activity." The alleged

predicates consist of (1) bribery of a public servant (KRS 521.020), (2) commercial bribery (KRS 518.020), (3) criminal attempt (KRS 506.010), (4) criminal conspiracy (KRS 506.040), (5) the Hobbs Act (18 U.S.C. § 1951), (6) the Travel Act (18 U.S.C. § 1952), and (7) mail and wire fraud (18 U.S.C. §§ 1341, 1343).

A pattern requires proof of at least two predicate acts within a span of ten years; however, proof of two acts of racketeering activity, without more, is insufficient to establish a pattern. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 238, 109 S. Ct. 2893 (1989). A plaintiff must show that the predicates are related, and that they amount to or pose a threat of continued criminal activity. *Id.* The acts of racketeering must exhibit "continuity plus relationship." *Id.*

The concept of "relatedneess" is established through acts which have "the same of similar purposes, results, participants, victims or methods of commission, or are otherwise irrelated by distinguishing characteristics and are not isolated events." *Vemco, Inc. v. Camardella*, 23 F.3d 129, 133 (6th Cir. 1994). Defendants do not dispute that the predicates plaintiffs allege meet the requirements of relatedness.

Defendants' argument is that plaintiffs allegations fail to demonstrate sufficient continuty. They contend that the amended complaint details a single scheme, arising from a single legal dispute. Defendants seek dismissal of all RICO claims on the grounds that this fails to meet the continuity requirement of RICO.

The Supreme Court has defined continuity as follows:

"Continuity" is both a closed- and open-ended

> concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. [citiations omitted]. It is in either case, centrally a temporal concept — and particularly so in the RICO context, where *what* must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear to one another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. (emphasis in original).

Id. at 241-42.

The concept of a pattern of racketeering activity encompasses multiple predicates within a single scheme. *Id.* at 240. Certainly the number of schemes is relevant to the inquiry; however, it is not dispositive. *Vemco,* 23 F.3d at 134. Dismissal is most appropriate where the alleged predicates consist of sporadic and isolated events occurring in an uncomplicated scheme, of short duration, and involving few participants. *Jaquith v. Newhard,* 1993 U.S. Dist. LEXIS 4214 (S.D.N.Y. April 20, 1993).

Accepting all allegations as true, plaintiffs set forth a complicated scheme involving several predicate acts. The racketeering acts are said to have occurred over a substantial period of time (since 1986) and pose the threat of continuing into the future, as plaintiffs are still the Fund's managers. The alleged acts can hardly be described as isolated or sporadic.

Appendix B

Plaintiffs describe continuous, systematic illegal activity on the part of the defendants, all to the detriment of the plaintiffs, the Fund's board, the Fund's beneficiaries, and the Fund itself. Defendants' argument that a single scheme cannot form a pattern is misplaced. *See Jacobson v. Cooper,* 882 F.2d 717, 720 (2d Cir. 1989) (single scheme to defraud single victim of his real estate holdings sufficient to survive motion to dismiss); *Polycast Technology Corp. v. Uniroyal, Inc.,* 728 F. Supp. 926, 948 (S.D.N.Y. 1989) (continuity found in single, complex scheme to defraud single victim); *Dymm v. Cahill,* 730 F. Supp. 1245, 1261 (S.D.N.Y. 1990) ("At the pleading stage, if the threat of continuing racketeering activity is inferable from the amended complaint, then whether defendants' actions are continuing in nature or isolated or sporadic will be the subject of proof at trial."). We find that plaintiffs' amended complaint sufficiently alleges a "pattern of racketeering activity."

Defendants' reliance upon *Manax v. McNamara,* 660 F. Supp. 657 (W.D. Tex. 1987), and *Edmondson and Gallagher v. Alban Towers Tenants,* 829 F. Supp. 420 (D.D.C. 1993), does not convince this court otherwise. *Manax* held that as a matter of law allegations involving a single scheme failed to state a pattern of racketeering activity. *Manax,* 660 F. Supp. at 663. Clearly *H.J., Inc.* teaches otherwise. *Alban Towers,* involved a dispute over a single contract to purchase. The court relied heavily upon the fact that the alleged predicates resulted in a single injury and that the scheme lacked the potential to extend to other persons or entities. *Alban Towers,* 829 F. Supp. at 424. In this case, plaintiffs' allegations go much further.

Defendants next argue for the dismissal of all RICO claims made pursuant to subsections (a) and (b) of 18 U.S.C. § 1962. Defendants contend that plaintiffs have failed to allege an

"investment" or "acquisition" injury as required by each respective subsection. Defendants assert that even if the plaintiffs have pled a pattern of racketeering activity, all § 1962(a) and (b) claims should be otherwise dismissed.

Under § 1962(a), a plaintiff must allege that (1) the defendant received money from a pattern of racketeering activity, (2) he or she invested that money into an enterprise, and (3) the enterprise affected interstate commerce. *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1188 (3d Cir. 1993). In addition, a plaintiff must allege an "investment injury," an injury resulting from the investment of tainted income, distinct from any injures caused by the predicate acts. *Id.; Vemco,* 23 F.3d at 132. Section 1962(a) requires that the plaintiffs' injury be caused by the use or investment of income in an enterprise. *Lightning Lube,* 4 F.3d at 1188.

Plaintiffs' amended complaint alleges:

> Defendants Boone, Hinkle and GTBM received income from the pattern of racketeering activity described herein and used or invested, directly or indirectly, part of such income in the operation of GTBM, as such constituting a violation of 18 U.S.C. § 1962(a).

Conclusory allegations of an investment injury are insufficient. *Id.*; *Vemco,* 23 F.3d at 132-33; *Bhatla v. Resort Development Corp.*, 720 F. Supp. 501, 508 (W.D. Pa. 1989). Similar bald assertions have met dismissal in other courts. *See Vemco,* 23 F.3d at 132-33; *Lightning Lube,* 4 F.3d at 1188; *Gotham Print, Inc. v. American Speedy Printing Ctrs., Inc.*, 1994 U.S. Dist. LEXIS 8225, *43 (E.D. Mich. March 15,

1994); *Pearl Vision, Inc. v. Shames,* 1994 U.S. Dist, LEXIS 8515, *20 (N.D. Ill. June 23, 1994). Plaintiffs have failed to allege any injury resulting from defendants' investment of money into the enterprise. Plaintiffs are required to plead an injury that "flowed from the defendant's use or investment of racketeering income." *Danielson v. Burnside-Ott Aviation Training Center,* 941 F.2d 1220, 1229 (D.C. Cir. 1991). Here, plaintiffs' allegations show that their injuries resulted from the predicate acts themselves; this is insufficient to maintain a cause of action under § 1962(a). *Vemco,* 23 F.3d at 132-33.

The same principles apply to allegations of an acquisition injury under § 1962(b). *Lightning Lube,* 4 F.3d at 1190; *Danielson,* 941 F.2d at 1231. In addition to showing an acquisition injury distinct from that caused by the predicate acts, subsection (b) requires a plaintiff to establish that the defendant's interest or control of the RICO enterprise was the result of racketeering activity. *Lightning Lube,* 4 F.3d at 1190. It is insufficient to allege that an individual, otherwise engaged in racketeering activity, maintained an interest in a legitimate enterprise. *Id.* For the reasons plaintiffs failed in making out a § 1962(a) claim, they have additionally failed in meeting the pleading requirements of § 1962(b). Plaintiffs' § 1962(b) claims will be dismissed.

Defendants also argue for dismissal of plaintiffs' § 1962(c) claims. Subsection (c) requires a plaintiff to prove that the defendant participated in the operation or management of an enterprise. *Reves v. Ernst & Young,* 113 S. Ct. 1163, 1172 (1993). Defendants contend that under no set of circumstances can it be proved that they participated in the operation or management of either the City of GTBM.

Defendants' argument appears to be threefold. First, they argue that they did not lead, run, or manage the affairs of an enterprise. At most, they contend their activities constituted, not operation or management of an enterprise, but mere participation in its affairs.

With regard to defendant's first argument, the Supreme Court has held:

> An enterprise is "operated" not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management. An enterprise also might be "operated" or "managed" by others "associated with" the enterprise who exert control over it as, for example, by bribery.

Id. at 1173.

Plaintiffs' amended complaint adequately pleads defendants' participation in the operation or management of the affairs of an enterprise. *Reves* clearly delineates that pursuant to § 1962(c) plaintiffs are not required to prove defendants exercised "significant control" over or within an enterprise. *Id.* at 1170, n. 4. At this stage in the proceedings, we cannot say that there exists no set of circumstances under which plaintiffs could prove defendants participated in an enterprise's affairs to the extent mandated by *Reves*.

The second prong of defendants' argument asserts that as attorneys providing legal services, defendants Boone, Hinkle, and Halliday, cannot be found to have participated in the operation or management of an enterprise. Citing *Sassoon v.*

Altgeld, 777, Inc., 822 F. Supp. 1303 (N.D. Ill. 1993), and *Gilmore v. Berg*, 820 F. Supp. 179 (D.N.J. 1993), defendants appear to claim attorney immunity from any §1962(c) claims.

Sassoon and *Gilmore* are easily distinguishable from the facts at hand. In both of those cases, the court dismissed RICO claims against counsel on the basis that the attorneys merely provided legal services; there were not, as in this case, allegations that any attorney participated directly in the fraudulent scheme. The allegations in plaintiffs' amended complaint more closely resemble those found in *Crowe v. Smith*, 848 F. Supp. 1258, 1264-65 (W.D. La. 1994). The *Crowe* court recognized that RICO affords no shield for attorney advocacy — at least where an attorney is alleged to have participated directly in the fraudulent scheme. *Id.*

Defendants' final argument asserts that plaintiffs lack standing to bring a § 1962(c) claim. Relying on *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275 (1985), defendants attempt to analogize plaintiffs to "whistleblowers." This court does not believe plaintiffs can be properly classified as "whistleblowers" and we find nothing in the case law to suggest otherwise.

Defendants' motion to dismiss the § 1962(c) count will be denied.

In their final argument, defendants claim plaintiffs' have insufficiently pled the RICO predicates. As previously mentioned, plaintiffs rely on violations of the Hobbs Act, Travel Act, mail and wire fraud statutes, and four state law statutes. Defendants only challenge plaintiffs' pleading as it relates to the three predicates based on federal law.

Appendix B

Proof of a Hobbs Act violation requires allegations that (1) the defendants induced or attempted to induce the victim to part with his property, (2) they did so by "extortion," and (3) interstate commerce was affected. 18 U.S.C. § 1951. Of pertinent inquiry to this action is whether defendants' actions could be construed as attempts at extortion. Defendants maintain that threats to initiate litigation, even if groundless, do not constitute extortion under the Hobbs Act. We agree.

The Eighth Circuit addressed this precise issue in *L.S. Joseph Co., Inc. v. J. Lauritzen A/S*, 751 F.2d 265 (8th Cir. 1984). The court held that the threat to file an action, however baseless, did not constitute extortion within the meaning of the Hobbs Act. *Id.* at 267. In so holding, the Eighth Circuit noted that only the most liberal reading of the extortion statute would bring such actions within its purview. *Id.* While threats to file a civil action may be violative of state law, they should not be said to be part of a pattern of racketeering activity. *Id.* Such a holding could unnecessarily chill access to the courts. *Id.* The court concluded:

> Judges and lawyers often complain that the courts are inundated with a flood of litigation, but the fact remains that litigation is as American as apple pie. If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary.

Id. at 267-68.

We are in accord with the rationale adopted by the *Lauritzen* court. Defendants' actions in threatening and initiating litigation, while potentially tortious under state law, are not acts of extortion

as defined by the Hobbs Act. We recognize there exists authority to the contrary. *See Hall American Center Associates v. Dick,* 726 F. Supp. 1083, 1097 (E.D. Mich. 1989) (defendant's filing of lawsuits and lis pendens constituted scheme to extort, sufficient to state a claim under Hobbs Act and serve as a RICO predicate). However, we feel that the Eighth Circuit has adopted the more sound rationale. *See also, Peterson v. Philadelphia Stock Exchange,* 717 F. Supp. 332, 336 (E.D. Pa. 1989) (resort to legal process does not constitute extortion under Hobbs Act); *American Nursing Care of Toledo v. Leisure,* 609 F. Supp. 419 (N.D. Ohio 1984) (threat of litigation not a RICO predicate). To the extent *Hall American* is indistinguishable from the facts at hand, we decline to follow its expansive reading. We find plaintiffs have failed to sufficiently allege a Hobbs Act violation.

Plaintiffs' second asserted predicate rests upon the Travel Act. The Travel Act prohibits the use of any facilities of interstate commerce, including the mail, to engage in unlawful activity. 18 U.S.C. §1952. The statute defines unlawful activity to include actions of bribery. *Id.* Plaintiffs' amended complaint is replete with allegations of bribery, which are pled with sufficient particularity. Defendants argue, for various reasons, that their actions did not constitute bribery. While this may be true, such an argument is more properly reserved for a motion for summary judgment. Accepting plaintiffs' allegations as true, this court finds a Travel Act violation has been pled.

Defendants finally challenge plaintiffs' reliance upon the mail and wire fraud statutes as a third predicate. To state a claim for mail fraud, a plaintiff must allege (1) a scheme or artifice to defraud and (2) use of the mails for purposes of executing that scheme. 18 U.S.C. § 1341. A claim for wire fraud requires the same showing, with the exception that a wire communication

is used rather than a mailing. 18 U.S.C. § 1343. Fed. R. Civ. P. 9(b) is applicable to allegations of mail and wire fraud. *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). Therefore, plaintiffs must additionally set forth (1) that defendants acted with intent to defraud, (2) what misrepresentations of material fact defendants made, upon which plaintiffs reasonably relied to their detriment, and (3) the time, place and content of defendant's misrepresentations. *Id.*

Nowhere in plaintiffs' amended complaint do they particularize any misrepresentation upon which they reasonably relied. Plaintiffs argue that reliance is not an element of mail or wire fraud and, therefore, need not be alleged. The Sixth Circuit has definitively held otherwise in *Bender* and recently in *U.S. v. Merklinger*, 16 F.3d 670 (6th Cir. 1994) (reaffirming that while proof of reliance is not necessary to a criminal conviction, it is an element for civil recovery). Plaintiffs have failed to sufficiently plead mail or wire fraud as a predicate act.

Coupling the Travel Act predicate with the four state law predicates, plaintiffs can still maintain the § 1962(c) RICO claim which remains. It follows that the § 1962(d) claim for RICO conspiracy remains viable as well. Defendants' motion to dismiss the remaining RICO claims will be granted.

WRONGFUL USE OF CIVIL PROCEEDINGS (COUNT II)

In defining the elements of a "wrongful use of civil proceedings," Kentucky has adopted the RESTATEMENT (SECOND) OF TORTS, §§ 674-76 (1977). *Mapother and Mapother, P.S.C. v. Douglas*, 750 S.W.2d 430, 431 (Ky. 1988).

Those sections of the Restatement read as follows:

Appendix B

§ 674. General Principle

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another is subject to liability to the other for wrongful civil proceedings if

(a) he acts without probable cause, and primarily for the purpose other than that of securing the proper adjudication of the claim in which the proceedings are based, and

(b) except when they are ex parte, the proceedings have terminated in favor of the person against whom they are brought.

§ 675. Existence of Probable Cause

One who takes an active part in the initiation, continuation or procurement of civil proceedings against another has probable cause for doing so if he reasonably believes in the existence of the facts upon which the claim is based, and either

(a) correctly or reasonably believes that under these facts the claim may be valid under the applicable law or

(b) believes to this effect in reliance upon the advice of counsel, sought in good faith and given after full disclosure of all relevant facts within his knowledge and information.

Appendix B

§ 676. Propriety of Purpose

> To subject a person to liability for wrongful civil proceedings, the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based.

RESTATEMENT (SECOND) OF TORTS, §§ 674-76 (1977).

Defendants argue that the plaintiffs have failed to allege that (1) defendants lacked probable cause in initiating the prior actions or (2) the previous litigation terminated in plaintiffs' favor. As both of these are essential elements of the tort "wrongful use of civil proceedings," we must find both to be sufficiently pled.

The question of probable cause hinges not upon whether there were facts sufficient to prove a lawsuit, but whether the belief that there existed a valid claim was reasonable. *Prewitt v. Sexton*, 777 S.W.2d 891, 896 (Ky. 1989). Probable cause has been defined "to be a suspicion founded upon circumstances sufficiently strong to warrant a reasonable person in the belief that the charge is true." *Id.* (quoting *Kassan v. Bledsoe*, 252 Ca. App. 2d 810, 60 Cal. Rptr. 799, 803 (1967).

In ¶¶ 106 and 107 of plaintiffs amended complaint, it is clearly stated that each and every defendant initiated and prosecuted civil proceedings without "probable cause." While the existence of probable cause is a legal issue to be determined by the court, we cannot presently make such a determination based solely on the pleadings. Without benefit of all the facts, we cannot opine on the reasonableness of defendants' belief as to the validity of this action. Plaintiffs have alleged defendants

acted without probable cause. At this juncture, this is sufficient to avoid a motion to dismiss.

Likewise, plaintiffs allege a termination in their favor of the previous litigation. While defendants contend the $175,000.00 settlement paid from Stock Yards Bank to the City necessarily suggests a successful claim against the plaintiffs, we do not agree. The settlement arrangement between Stock Yards and the City established the following:

1. In return for the payment of $175,000.00, the City discharged Stock Yards Bank;

2. As part of the settlement, an agreed order was entered which dismissed all claims against Keith Cullinan and Cullinan Associates, Inc.;

3. The City reserved any claims it had against all remaining defendants.

In order for the plaintiffs to demonstrate termination of the prior proceedings in their favor, they must show that the termination related to the merits. *Alcorn v. Gordon*, 762 S.W.2d 809, 812 (Ky. App. 1989). If the termination did not reflect on the innocence or responsibility for the alleged misconduct, the termination was not favorable in the sense of supporting a subsequent action for wrongful use of civil proceedings. *Id.*

In Kentucky, an agreed order dismissing the prior action may be classified as a favorable termination sufficient to support a wrongful use of civil proceedings claim. *Raine v. Drasin*, 621 S.W.2d 895, 899-900 (Ky. 1981). Stock Yards Bank could not maintain such a cause having settled its dispute monetarily.

See, Alcorn, 762 S.W.2d at 812. *See also, Lackner v. LaCroix,* 25 Cal. 3d 747, 159 Cal. Rptr. 693, 602 P.2d 393 (1979). However, plaintiffs claim they were not parties to the settlement and never made a monetary payment to the City of any kind.

Plaintiffs' attempts to distance themselves from the settlement agreement is not an untenable position. Obviously Stock Yards Bank sought to extricate itself from the prior lawsuit. In seeking its own dismissal, it also had to seek dismissal of the claims against Cullinan, its former employee. If Stock Yards left Cullinan in the case, the City could have continued to pursue its claim against Cullinan. Hypothetically, if judgment was obtained against Cullinan, he could have then sought indemnity from Stock Yards Bank. Stock Yards' prior dismissal would, in effect, have been rendered meaningless. In effect, Cullinan was an incidental beneficiary to the settlement between the City and Stock Yards.

Therefore, accepting plaintiffs' allegations as true, we find plaintiffs have sufficiently pled a favorable termination of the previous litigation. Defendants' motion to dismiss Count II will be denied.

ABUSE OF PROCESS (COUNT III)

The elements for the tort abuse of process are (1) an ulterior purpose and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding. *Bonnie Braes Farms, Inc. v. Robinson,* 598 S.W.2d 765, 766 (Ky. App. 1980). Abuse of process is not commencing the action itself, but misusing process for another end, *i.e.,* using process to secure a collateral advantage or as a threat or club. *Flynn v. Songer,* 399 S.W.2d 491, 494 (Ky. 1966). "There is, in other words, a form of

extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of process itself, which constitutes the tort." *Id.* (quoting PROSSER ON TORTS (3D ED.), § 115, pp. 876-77.

Paragraphs 39 - 45 of plaintiffs' amended complaint state that defendants threatened to institute litigation against the plaintiffs and the trustees of the fund unless certain conditions were met. Those conditions included the dismissal of suit No. 1, the discharge of the plaintiffs, and allowing defendant Abramson to appoint all further trustees. Accepting plaintiffs' allegations as true, the defendants threatened, and then initiated, litigation in an attempt to coerce the plaintiffs and the trustees into complying with their demands. We find that through these allegations, plaintiffs have stated a *prima facie* case for abuse of process. Defendants' motion to dismiss Count III will be denied.

CIVIL RIGHTS CLAIMS (COUNT IV)

Defendants make two additional arguments concerning plaintiffs' Section 1983 claims. First, defendants argue that such claims are time barred and should be dismissed. Second, defendant City argues that plaintiffs' Section 1983 claims fail to state a claim. We will address each contention respectively.

Section 1983 does not provide its own statute of limitations. Therefore, state law provides the limitations period to be applied. *Sevier v. Turner,* 742 F.2d 262, 272 (6th Cir. 1984). The Sixth Circuit has held that in Kentucky, KRS 413.140 and its one-year statute of limitations controls. *Lovelace v. O'Hara,* 985 F.2d 847, 852 (6th Cir. 1993). The limitations clock begins to tick when the plaintiff knows or has reason to know of his or her injury. *Sevier,* 742 F.2d at 273. A plaintiff

has reason to know of an injury when the injury should have been discovered through the exercise of reasonable diligence. *Id.*

Plaintiffs' amended complaint was filed on March 21, 1994. This makes March 21, 1993 the pertinent date for limitations purposes. We find paragraphs 45 and 69 of plaintiffs' amended complaint particularly instructive:

> 45. Defendant Hinkle, and Defendants Abramson, Jay, Unger and Heavrin acting through other persons, continued the threats and demands of Defendant Boone in subsequent meetings regarding Suit No. 1, specifically in December, 1992, or January, 1993, and August or September, 1993. By these actions, Defendants have offered to confer a pecuniary benefit upon public servants by relieving them of the personal expense of defending against and/or paying personally under Suit Nos. 2 and 3 with the intent to influence the actions of the public servants as Trustees of the Fund.
>
> 69. Defendants Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, have continued, attempted to continue or conspired to continue the threats and demands of Defendant Boone in subsequent meetings regarding Suit No. 1, specifically in December, 1992, or January, 1993, and August or September, 1993. They have attempted to obtain, or conspired to obtain, the valuable property rights of the Trustees of the Fund to solicit and transact business with whomever they chose, of the elected Trustees to serve on the Board, to make business

decisions free of outside pressures, and of the beneficiaries of Pension Fund to the return of monies rightfully theirs.

Plaintiffs' Section 1983 claims principally allege that the defendants interfered with their speech and property rights. Plaintiffs' allegations are that defendants' Section 1983 violations occurred through threats and retaliatory actions, including the institution of frivolous litigation. Paragraphs 45 and 69 allege such actions continued up to and including "August or September, 1993."

Any such actions, occurring in late 1993, would clearly fall well within the one-year limitations frame. Defendants' motion to dismiss based on statute of limitations grounds will be denied.

Next, defendant City argues that plaintiffs' Section 1983 claim fails to state a claim against it as an entity. The City argues that "for the reasons supporting the individual Defendants' claim to qualified immunity, the City is entitled to dismissal of Plaintiff Cullinan's Section 1983 claim for violation of his civil rights."

We have earlier disposed of the qualified immunity and capacity issues as they pertain to individual defendants. For the previously-stated reasons, we do not find it appropriate to dismiss the Section 1983 claims as they pertain to the City.

INTERFERENCE WITH PROSPECTIVE AND ACTUAL CONTRACTUAL RELATIONSHIPS (COUNT V)

Kentucky protects actual and prospective contractual relations from improper interference. *National Coll. Athletic*

Ass'n v. Hornung, 745 S.W.2d 855, 857 (Ky. 1988). This state has adopted the RESTATEMENT (SECOND) OF TORTS in relation to such claims. *Id.* Particularly, the Restatement provides:

> § 766 Intentional Interference with Performance of Contract by Third Person
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.
>
> § 766A Intentional Interference with Another's Performance of His Own Contract
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him.
>
> § 766B Intentional Interference with Prospective Contractual Relation
>
> One who intentionally and improperly interferes with another's prospective contractual relation

> (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation, whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.

RESTATEMENT (SECOND) OF TORTS, §§ 766, 766A, 766B (1977).

Under these sections, a plaintiff must assert that the alleged tort-feasor had knowledge of the contract or prospective relation and intentionally interfered with such contract or prospective relation. RESTATEMENT (SECOND) OF TORTS, § 766 cmt. i (1977). Plaintiffs' amended complaint states:

> 123. By the actions set forth herein, all defendants have induced or otherwise caused current, former or prospective clients of plaintiffs either not to continue their contractual relationships with plaintiffs or not to enter into new contractual relationships with plaintiffs.
>
> 124. The actions of defendants as set forth in this Count were intentional.
>
> 125. Defendants have improperly interfered with plaintiffs' prospective and actual contractual relationships and hence are subject to liability to plaintiffs in that regard.

Appendix B

Nowhere have plaintiffs alleged that defendants had knowledge of the contracts or prospective contracts with which they allegedly interfered. The sole exception to this concerns the contract with the Fund. Plaintiffs have sufficiently stated a cause of action for tortious interference with an actual relationship as it pertains to their contract to manage the Fund. Beyond this, plaintiffs have not made out a *prima facie* case for interference with any other actual or prospective contractual arrangement. Accordingly, defendants' motion to dismiss will be partially granted.

PUNITIVE DAMAGES (COUNT VI)

In Kentucky, an award of punitive damages is improper unless "the plaintiff has suffered an injury for which compensatory damages might be awarded." *Lawrence v. Risen,* 598 S.W.2d 474, 476 (Ky. App. 1980) (quoting *Louisville & N.R. Co. v. Ritchel,* 147 S.W. 411, 414 (Ky. 1912)). Defendants argue that since plaintiffs have "failed to allege the existence of any tort . . . their claim for punitive damages must also be dismissed." Since this court has found that plaintiffs have sufficiently pled several torts, defendants' argument must fail. A claim for punitive damages rises or falls along with the underlying torts. *Id.* Since plaintiffs still maintain viable tort claims, the claim for punitive damages remains viable as well. Defendants' motion to dismiss Count VI will be denied.

INDEMNIFICATION (COUNT VII)

Plaintiffs claim that pursuant to statute and ordinance, defendant City is required to indemnify some or all of the defendants for some or all of plaintiffs' claims. Plaintiffs' indemnification claim, Count VII, seeks to hold defendant City liable for all damages awarded against the defendants which the City is required to indemnify.

We see two problems with plaintiffs' assertion of this claim. First, plaintiffs lack standing to bring such a claim. Any claim for indemnification is possessed by the individual defendants. Plaintiffs cannot presently assert an indemnification claim against the City when the right to be indemnified may rest with the defendants.

Second, any claim for indemnification is speculative. Indemnity can only be asserted upon an award of damages. Plaintiffs have yet to establish liability on the part of any defendant. Not only do plaintiffs lack standing to assert a claim for indemnification, but they have yet to prove underlying liability. Defendants' motion to dismiss Count VII will be granted.

DAMAGES PURSUANT TO KRS 446.070 FOR VIOLATIONS OF MISCELLANEOUS STATUTES (COUNT VIII)

Count VIII of plaintiffs' amended complaint asserts claims against defendants Jay, Unger and Heavrin. Plaintiffs' claims are brought pursuant to KRS 446.070 which provides:

> **Penalty no bar to civil recovery.** A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.

Plaintiffs allege that the following actions constituted "Official Misconduct in the First Degree" in violation of KRS 522.020: (1) Jay and Unger's attempts to coerce the Fund's Trustees into terminating plaintiffs, (2) Heavrin's refusal to provide indemnity to the Fund's Trustees, (3) Heavrin's

providing of indemnity to defendant Nevin, and (4) Jay's refusal to transfer to the Fund monies which had been duly appropriated to it.

KRS 522.020 provides:

> **Official Misconduct in the First Degree.** (1) A public servant is guilty of official misconduct in the first degree when, with intent to obtain or confer a benefit or to injure another person or to deprive another person of a benefit, he knowingly:
>
> (a) Commits an act relating to his office which constitutes an unauthorized exercise of his official functions; or
>
> (b) Refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
>
> (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

In seeking dismissal of this count, defendants respond twofold. First, they argue that the plaintiffs lack standing to maintain such a claim. Alternatively, they assert absolute immunity to such allegations. Particularly, Heavrin claims absolute immunity for her decisions pertaining to indemnification.

Defendants' motion to dismiss for lack of standing lies in arguing that plaintiffs' alleged injuries are not sufficiently personalized. In order to have standing to assert a claim for

official misconduct, plaintiffs must have an interest in this litigation which differs from that of every other member of the public. *Wegener v. Wehrman,* 227 S.W.2d 997, 998, (Ky. 1950). A private citizen must possess more than a common concern for obedience to the law before an action can be maintained against a public official. *Fish v. Elliott,* 554 S.W.2d 94, 96 (Ky. App. 1977). The individual must allege an injury which is "special or peculiar to himself" and distinct from that suffered by the general public. *Id.*

This court concludes that plaintiffs have sufficiently alleged injuries unique to their person. The acts complained of all relate to alleged interference with the plaintiffs' interest in the Trust Fund. This is not a grievance brought by a member of the public in general. The majority of cases to which defendants cite address situations where citizenship was the sole basis for the plaintiff's standing. This was deemed insufficient, in and of itself, to challenge the actions of public officials. *See Carrico v. City of Owensboro,* 511 S.W.2d 677, 680 (Ky. 1974). Such is not the case in this litigation. Plaintiffs have sufficiently alleged injuries "special or peculiar" to themselves and distinct from any injury suffered by the general public.

Defendants rely heavily upon *Lexington R.B.D. Ass'n v. Dept. of A.B.C. Board,* 303 S.W.2d 268 (Ky. 1957). In that case, several alcohol distributors in Fayette County challenged an order by the Alcoholic Beverage Control Board which increased the quota of liquor licenses in the county. The court held that the plaintiffs had no standing to challenge such action since they could not assert an individual interest or right. *Id.* at 270. The liquor license bestowed no contract or property right on its holders and they had "no right to be free from competition." *Id.*

Defendants argue that similarly, plaintiffs have no right to be free from competition for the right to manage the trust fund. While this may be true, we see some important distinctions between this litigation and *Lexington R.B.D.* In *Lexington R.B.D.*, the court specifically found that the plaintiffs had no contract or property right. We are not currently prepared to make such a finding. Neither are we dealing with a situation where plaintiff is complaining due to increased competition. Even if this were a case involving competitive business, actions of public officials based on fraud, collusion, or dishonesty can be challenged. *See Healthamerica Corp. v. Humana Health Plan,* 697 S.W.2d 946, 948 (Ky. 1985). Therefore, we find plaintiffs have standing to assert the state law claims for "official misconduct" against defendants Jay, Unger, and Heavrin.

Finally, defendants argue for immunity from liability. In a familiar argument, they claim to have been involved in quasi-legislative or quasi-judicial functions and also rely on KRS 65.2003(3). We feel that our previous discussion on such matters is applicable to these defendants as well.

The motion to dismiss Count VIII by defendants Jay, Unger, and Heavrin will be denied.

OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS (COUNT IX)

Kentucky recognizes the tort of outrageous conduct causing severe emotional distress (otherwise known as the tort of "outrage"). *Kraft v. Rice,* 671 S.W.2d 247, 251 (Ky. 1984).

The tort has been defined as follows:

Appendix B

> One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Id. (quoting RESTATEMENT (SECOND) OF TORTS § 46).

The tort of "outrage" has been recognized as a "gap-filler," designed to provide redress for extreme emotional distress in those instances where traditional common law claims fail to do so. *Rigazio v. Archdiocese of Louisville,* 853 S.W.2d 295, 299 (Ky. App. 1993). Where the defendant's conduct "amounts to the commission of one of the traditional torts such as assault, battery, or negligence for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie." *Id.*

For plaintiffs to maintain this cause of action defendants' tortious conduct must have been (1) of a kind for which recovery for emotional distress is not allowed and (2) with the sole intent to cause extreme emotional distress in the victim. *Id.*; *Michals v. William T. Watkins Meth. Church,* 873 S.W.2d 216, 220 (Ky. App. 1994). This court finds that plaintiffs have failed to meet either of *Rigazio's* two prerequisites to an outrage claim.

First, plaintiffs' amended complaint alleges the commission of at least one tort for which recovery for emotional distress is allowed. Damages based on emotional distress are allowable under a defamation claim. *Rich v. Kentucky Country Day, Inc.* 793 S.W.2d 832, 838 (Ky. App. 1990).

Appendix I

Second, there is no allegation that defendants' conduct was intended *solely* to cause emotional distress. Plaintiffs are required to demonstrate that defendants' conduct was to demonstrate that defendants' conduct was intended for the sole purpose of invading plaintiffs' interest in freedom from emotional distress. *Rigazio*, 853 S.W.2d at 299; *Michals*, 873 S.W.2d at 220. Plaintiffs' allegations can in no way be construed as implying that defendants' actions were for the singular purpose of causing plaintiffs extreme emotional distress. As such, defendants' motion to dismiss Count IX will be granted.

DEFAMATION (COUNT X)

Plaintiffs charge defendants City and Abramson with defamation in Count X. Paragraph 78 of the amended complaint states that "[e]mployees, agents or representatives of the City have repeatedly slandered and libelled Plaintiffs." Plaintiffs specifically complain of the following:

(1) June, 1992

Kathleen Partlow, spokesman for Defendant City and Defendant Abramson stated that "the Cullinans are crooks."

(2) November, 1992

Andy L. Cherry, the citizens member on the Fund, and an associate of Defendant Jay, prepared and published false and misleading comparisons concerning the commission charges of the Fund and although knowing that there is no such requirement to do so, accused Plaintiffs of not seeking competitive bids on brokerage commissions.

Appendix B

(3) January, 1993

Persons employed by the City state that "money is changing hands under the table" between Plaintiffs, the elected Trustees and others even though "they can't find any proof of it."

(4) April 1, 1993

Defendant Abramson falsely advised Mrs. Helen Ramsey that Plaintiffs had initiated a lawsuit against the City causing the City to incur attorney's fees, and implying that Mrs. Ramsey's complaints re her bonuses were attributable to the actions of Plaintiffs.

(5) May 27, 1993

On May 27, 1993, the City issues a press release which falsely represented that plaintiffs had settled with the City, when in point of fact, the City was voluntarily dismissing as to them. The purpose of the aforementioned press release was to hold the Plaintiffs out to the public in a false light, and to further defame, damage and embarrass Plaintiffs by giving the impression that one or both of them had paid to be released from the claims made in Suit Nos. 2 and 3 when in fact that was not the case.

(6) May 31, 1993

Defendant Abramson, in a letter published in the Courier-Journal, referred to the "questionable management practices of the Fund," his "grave

concern that police pensioners and widows of pensioners are not being well represented by the management of the Fund," and that "there are real questions as to whether the best interests of retired Louisville police officers and their widows are being served. Mismanagement of the Police Pension Fund is a legitimate concern, and best pursued through the legal system as the only way to protect the rights of the pensioners."

(7) June 10, 1993

Letter from Andy L. Cherry to Senator Louie Mack stating that "the low level of benefits paid to those who receive pensions from the Policeman's Fund is almost entirely the result of questionable management practices of the Fund's Board of Trustees." Mr. Cherry again republished the same misleading and inaccurate comparisons referenced above.

(8) June 26, 1993

Andy L. Cherry Letter to Editor published in the Courier-Journal on july 26, 1993 referring to "questionable investment practices" of the Policeman's Fund.

Initially we note that in Kentucky, the statute of limitations on an action for defamation is one year. KRS 413.140(1)(d). Therefore, the statute of limitations bars the first three statements about which plaintiffs complain. In brief, plaintiffs appear to admit as much. We will grant defendants' motion to dismiss

plaintiffs' defamation claims as it relates to the statements of June 1992, November 1992, and January 1993.

With regard to the remaining statements, four elements are necessary to establish a cause of action: (1) defamatory language, (2) about the plaintiff, (3) which is published, and (4) which causes injury to reputation. *Columbia Sussex Corp., Inc. v. Hay,* 627 S.W.2d 270, 273 (Ky. App. 1981).

A writing is defamatory if it (1) brings a person into public hatred, contempt, or ridicule, (2) causes him to be shunned or avoided, or (3) injures him in his business or occupation. *McCall v. Courier-Journal & Louisville Times,* 623 S.W.2d 882, 884 (Ky. 1981). A statement should be considered as a whole to determine if its "gist or sting" is defamatory. *Id.*

There are two kinds of defamatory statements: (1) those which necessarily damage the plaintiff and are actionable *per se*; and (2) those which are actionable through consideration of extrinsic facts showing the circumstances under which they were written or spoken and the damages resulting therefrom. *Digest Publishing Company v. Perry Publishing Co.* 284 S.W.2d 832, 834 (Ky. 1955).

Plaintiffs claim that defendants' actions fall into this latter group of statements, thereby necessitating an inquiry into the surrounding facts, and a denial of defendants' motion to dismiss. Defendants make several arguments for dismissal, including that the statements are true, not directed toward the plaintiffs, and are privileged. Examination of each statement reveals merit in both parties' contentions.

Appendix B

Statement of April 1, 1993

On April 1, 1993, defendant Abramson responded to a letter sent to him from Mrs. Helen Ramsey. Mrs. Ramsey questioned the benefits she received from the Fund. Particularly she asked, "[h]ow can the City spend nearly a half-million dollars to attorneys fighting to keep us from receiving what is rightfully ours . . . especially when the amount of the bonus is less than that paid to attorneys? What has our group done to deserve such shoddy treatment?"

The portion of Abramson's letter responding to Mrs. Ramsey about which plaintiffs complain reads as follows:

> I would like for you and your fellow beneficiaries to understand that the payment of attorney fees by the City, which you refer to in your letter, is not something the City initiated unilaterally. There are *seven* individual cases in what I call the *Pension Fund Cases. Three* of those cases were initiated by the Board of Trustees of the Pension Fund and *one* suit was initiated by the Fund's Investment Advisor against the City. The City has *no* choice but to defend these actions.

Plaintiffs complain that Abramson's response falsely advised Mrs. Ramsey that plaintiffs had initiated a lawsuit against the City and implied that her complaints were attributable to the plaintiffs. We do not agree. There is nothing in Abramson's letter which is (1) not true or (2) can in any way be construed to defame plaintiffs. Abramson's recitation of the legal history of the pension fund cases correctly states the facts. Truth is a complete defense to a defamation action. *Bell v. Courier-Journal*

& Louisville Times Co., 402 S.W.2d 84, 87 (Ky. 1966). Plaintiffs' defamation claim based on the statement of April 1, 1993 will be dismissed.

Statement of May 27, 1993

The following press statement was released by Abramson's office on May 27, 1993:

> The City of Louisville has reached a settlement with Stock Yards Bank in the City and Nevin v. Stock Yards Bank, et al.
>
> The City received $175,000 from Stock Yards Bank under the settlement, releasing three parties, Stock Yards Bank, Cullinan and Associates, and R. Keith Cullinan, from the litigation.
>
> The City filed suit against Stock Yards Bank, Cullinan and Associates, Shearson Lehman and two of its brokers, and five elected members of the Board of Trustees of the Police Pension Fund, questioning their investment policies for the Police Pension Fund.
>
> The settlement did not include Shearson Lehman, Anthony Trusty, Ted Phillips, or the five elected members of the Police Pension Board of Trustees. The City anticipates litigation against these parties will continue.
>
> The settlement funds will be returned to the City's General Fund as partial repayment of tax dollars the

Appendix B

City expended to keep the Police Pension Fund actuarially sound.

Despite plaintiffs' claims that this press release falsely gives the impression that plaintiffs settled with the City, we find it to be non-defamatory as a matter of law. There is nothing stated in the press release which is not true. The fact of the matter is that the City received $175,000.00 from Stock Yards Bank and released the three named parties. Regardless of whether the plaintiffs were incidental beneficiaries to such a release, the press statement does not make a false statement. Therefore, defendants' motion to dismiss any defamation claim based on the May 27, 1993 press release will be granted.

Statement of May 31, 1993

Abramson's letter to the editor of May 31, 1993 presents an entirely different scenario. In it, he refers to the "questionable investment practices of the Fund." He further questions whether the interests of the police officers has been served, stating that "mismanagement of the Police Fund is a legitimate concern."

While defendants claim that this language is not defamatory towards the plaintiffs, we believe plaintiffs can presently survive a motion to dismiss. So long as the alleged defamatory statement is directed towards a small group, of which plaintiff is a part, plaintiff has standing to challenge the action. *Columbia Sussex* 627 S.W.2d at 274-75. There can be no doubt that in this case, plaintiffs are among a small group of people in charge of Fund management.

We also decline to grant defendant Abramson immunity for such statements. Absolute immunity for defamatory

communications has been "confined to judicial and legislative proceedings, matters involving military affairs, and communications made in the discharge of a duty under express authority by law by or to heads of executive departments of state." *Lanier v. Higgins*, 623 S.W.2d 914, 195 (Ky. App. 1981) (quoting *Tanner v. Stevenson*, 128 S.W. 878 (1910)). Any claim of qualified immunity or privilege cannot be resolved on the current facts, and must be further developed by the evidence. *See Columbia Sussex*, 627 S.W.2d at 275-76. Plaintiffs have sufficiently made out a prima facie case for defamation as to the statements of May 31, 1993.

June 10, 1993 and July 26, 1993

The final two statements about which plaintiffs complain can be discussed together, as they are substantially similar. Both concern letters written by Andy L. Cherry, whom plaintiffs allege was an agent or employee of the City. Cherry's statements, similar to those of defendant Abramson, questioned the management and investment practices of the Fund.

In ruling on Abramson's letter which questioned Fund management, we found that plaintiffs had sufficiently stated a cause of action for defamation. The same analysis controls as to those statements by Cherry which question Fund management. While defendants correctly point out that an employer is only liable for employee statements made within the scope of employment, plaintiffs have so alleged. Therefore, defendants' motion to dismiss the defamation counts based on the June 10, 1993 and July 26, 1993 statements will be denied.

Appendix B

COUNTS AS TO DEFENDANT BOONE

While defendant Boone adopts many of the arguments asserted by his fellow defendants, several arguments unique to his person bear comment. Where not specifically stated otherwise, the analysis applicable to the remaining defendants controls as to Boone as well.

First, Boone argues that all counts should be dismissed as to him because all actions taken by him were done in his role as counsel. Secondly, Boone claims that he withdrew from GTBM in May of 1991 making all claims time barred as to him.

Boone's first ground for dismissal is misplaced. Boone, like defendants Hinkle and Halliday, cannot rely solely on his role as an attorney to gain dismissal from this litigation. We have previously cited numerous cases recognizing that attorneys are not absolutely immune for all actions taken in the initiation or prosecution of litigation. *See Raine v. Drasin,* 621 S.W.2d 895 (Ky. 1981); *Bonnie Braes Farms, Inc. v. Robinson,* 598 S.W.2d 765 (Ky. App. 1980). The court has earlier whether all elements, including defendant Boone's requisite mental state, have been pled. Boone's cited authority addresses attorney immunity for defamation claims based on statements made during litigation. While there may be attorney immunity from such claims, Boone has not been sued for defamation. His argument is inapplicable to those remaining asserted claims.

Whether all claims against Boone are time-barred presents a more intriguing question. The counts asserted against Boone are I (RICO), II (Wrongful Use of Civil Proceedings), III (Abuse of Process), IV (Section 1983), V (Intentional Interference with Prospective and Actual Contractual Relationships), VI (Punitive

Damages), and IX (Outrageous Conduct Causing Severe Emotional Distress). While this action was filed in March of 1994, it is undisputed that defendant Boone's association with GTBM and the matters precipitating this litigation ended in May, 1991.

Count I has a four-year statute of limitations, making that claim possibly viable as to Boone. Although Count II has a one-year limitation period, such a cause of action cannot accrue until the prior litigation terminates in plaintiffs' favor. *Alcorn v. Gordon,* 762 S.W.2d 809, 812 (Ky. App. 1989). Since the prior proceedings did not terminate until April of 1993, Count II is viable. Of course, the viability of Count VI naturally follows. However, all remaining counts must be dismissed. Counts III, IV, and V have a limitation period of one year and their accrual was not delayed beyond defendant Boone's exit from this litigation. Count IX has already been dismissed as to all defendants.

Therefore, for the foregoing reasons, Counts III, IV, V, and IX will be dismissed as to defendant Boone.

An order in accordance with this memorandum opinion will be entered this date.

This 22nd day of Februrary 1994

s/ Charles R. Simpson III
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE ENTERED FEBRUARY 22, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CIVIL ACTION NO. 94-0198-L(S)

R. KEITH CULLINAN and CULLINAN ASSOCIATES, INC.

PLAINTIFFS

v.

JERRY E. ABRAMSON, et al

DEFENDANTS

ORDER

This matter having come before the court on defendants' motions to dismiss, and the court having considered said motions and being otherwise sufficiently advised, **IT IS HEREBY ORDERED:**

1. Defendants' motion to dismiss plaintiffs' RICO claims based on 18 U.S.C. §§ 1962(a) and (b) are **GRANTED**. Defendants' motions to dismiss plaintiffs' claims based on 18 U.S.C. §§ 1962(c) and (d) are **DENIED.**

2. Defendants' motions to dismiss plaintiffs' claim for wrongful use of civil proceedings are **DENIED**.

3. Defendants' motions to dismiss plaintiffs' claim for abuse of process are **DENIED**. Defendant Boone's motion to dismiss this claim is **GRANTED**.

4. Defendants' motions to dismiss plaintiffs' claim for deprivation of constitutional rights pursuant to 42 U.S.C. § 1983 are **DENIED**. Defendant Boone's motion to dismiss this claim is **GRANTED**.

5. Defendants' motions to dismiss plaintiffs' claim for interference with prospective and actual contractual relationships are **DENIED** as they pertain to plaintiffs' contract with the Fund. To the extent plaintiffs attempt to assert a claim for interference with any other contractual relationship, actual or prospective, defendants' motions are **GRANTED**. Defendant Boone's motion to dismiss this claim is **GRANTED** in its entirety.

6. Defendants' motions to dismiss plaintiffs' claim for punitive damages are **DENIED**.

7. Defendants' motions to dismiss plaintiffs' claim for indemnity are **GRANTED**.

8. Defendants' motion to dismiss plaintiffs' claim for damages pursuant to KRS 446.070 is **DENIED**.

9. Defendant's motions to dismiss plaintiffs' claim for outrageous conduct causing severe emotional distress are **GRANTED**.

10. Defendants' motion to dismiss plaintiffs' claim for defamation is **GRANTED** as it pertains to the statements of June 1992, November 1992, January 1993, April 1, 1993, and May 27, 1993. Defendants' motion is **DENIED** with regard to the remaining statements.

IT IS SO ORDERED this 22nd day of February, 1994.

s/ Charles R. Simpson III
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED DECEMBER 18, 1997

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 95-5416/5417/5418/5419

R. KEITH CULLINAN, ET AL.,

Plaintiffs-Appellees,

v.

JERRY E. ABRAMSON, ET AL.,

Defendants-Appellants,

CITY OF LOUISVILLE,

Defendant.

ORDER

BEFORE: NELSON and SILER, Circuit Judges; and WISEMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the

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* Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX E — AFFIDAVIT OF R. KEITH CULLINAN

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

CASE NO. C-94 0198-L-S

R. KEITH CULLINAN and CULLINAN ASSOCIATES, INC.

Plaintiffs

vs.

JERRY E. ABRAMSON, ET AL

Defendants

AFFIDAVIT OF R. KEITH CULLINAN

Plaintiff, R. Keith Cullinan, after being first duly sworn, files the following Affidavit in opposition to the Motions to Dismiss filed by Defendants.

1. I am an investment manager. A Yale graduate and a lawyer who graduated at the top of my class, I have been a respected practitioner in the field of trusts and estates for over 34 years. I author legal form books for use by attorneys nationwide, and have served as an expert in litigation involving fiduciary law. I was Executive Vice-President in charge of the Trust Department at First Kentucky Trust Company (affiliated with First National Bank of Louisville) until 1974 and thereafter at Stock Yards Bank & Trust Company. From January, 1990, through to the present time, I have been the President and Chief Executive Officer of Cullinan Associates, Inc. ("Cullinan

Associates"), an investment management firm. While an employee at First Kentucky Trust and then at Stock Yards Bank, I rose through the ranks, attaining the position of Executive Vice-President and Trust Officer at both banks and membership on the Board of Directors of Stock Yards Bank and SY Bancorp prior to starting my own company. I am not now nor have I ever been a stockbroker, nor has Cullinan Associates, nor do we receive or have we ever received "brokerage commissions" as Defendants repeatedly misrepresent throughout their Motions to Dismiss. As an investment manager, Cullinan Associates receives fees for its services, fees which are generally set as a percentage of the assets under management.

2. I have used the technique known as covered call option writing on high quality common stock since 1975 in connection with my responsibilities for trust and investment management. Covered call option writing is a statutorily-authorized, ERISA-approved conservative investment technique designed to reduce the risks inherent in stock ownership. It involves selling ("writing") options on high-quality common stocks to increase internally-generated income as well as to reduce volatility (risk) of these holdings. The opposite of speculation, covered option writing has been widely used for over 20 years by conservative investment managers world-wide, such as pension funds, insurance companies, banks and others, including such local institutions as Hilliard-Lyons, PNC Bank, Liberty National Bank and First Kentucky Trust Company (the trust affiliate of First National Bank).

3. In covered call option writing, one owns the stock and then sells an option on that stock that is exercisable at a specified price within a prescribed period of time. In most instances, the option will expire unexercised, thereby generating return for

the option seller that he would never have realized had he simply held the stock and not sold the option. A more detailed description of covered call option writing is provided at Tab 1, which is a hand-out describing covered call option writing strategies. As an example of the potential for profit on common stock holdings when covered call options are written, I would point out to the Court that the Louisville Police Pension Fund made $2,397,680 in the two years 1992 and 1993 alone in profit from options that expired on equity holdings the Pension Fund held (and still held after the options expired).

4. The Plaintiffs in Suit Nos. 2 and 3 never took my deposition about ***anything*** in the lawsuits against me. They did not solicit information (which presumably should have been in their possession anyway) reflecting the actual profit to the Pension Fund as the result of investment management services I had been providing to the Fund. Instead, Defendants have been content just to make their baseless, unspecific and indeed unfounded allegations that I have mismanaged Fund assets and breached my fiduciary responsibilities in representing the Pension Fund as an investment manager. Similarly, the Defendants have been happy to continue their baseless and erroneous comparisons of performance between the Policemen's Pension and the Firefighters' Pension as purported proof of some sort of alleged mismanagement. Defendant Abramson's letter of May 31, 1993, and Andy Cherry's letters and attachments of June 10, 1993, and July 26, 1993, demonstrate this. Defendant Abramson's and Mr. Cherry's letters (and the attachments) are ***not*** "substantially true" as represented by defense counsel in their Motions to Dismiss. Indeed, a host of significant information is misstated, facts are misrepresented and material omissions are made.

Appendix E

5. As best I can determine from documents regarding the Firefighters' Fund which are available to me, the equity holdings in the Firefighters' Fund and the equity holdings that I manage for the Policemen's Fund were substantially equal (approximately $18 million) on December 31, 1991. The Funds used different investment strategies. For calendar years 1992 and 1993, the Policemen's Fund earned considerably more ***net*** return from its equity assets than did the Firefighters. Expressed as a percentage of return on assets, the Policemen's Fund produced a ***net return*** after all brokerage commissions of 11.5% in 1992 and 13.2% in 1993. By comparison, the Firefighters' Fund earned only 7.8% in 1992 and 7.3% in 1993. Translated into dollar amounts, the Policemen earned $4,524,945 for these two years, while the Firefighters earned $2,564,047, again, ***net*** of all commission costs. A major factor in this substantial superior performance for these years was the covered call option writing strategy, and although this strategy obviously requires brokerage services to write each option, thereby necessarily generating more total brokerage commissions, the foregoing figures are ***net*** results after such commissions. In sum, and as a result of the investment strategies practiced by me and Cullinan Associates, Inc., the Policemen's Fund ***netted*** some $1,960,898 ***more return*** from its equity holdings than did the Firefighters' Fund for the calendar years 1992 and 1993.

6. In 1978, I began providing investment management services to the Firefighters' Pension Fund using covered call option writing. Over the years, my performance for the Firefighters' Pension Fund was lauded and much appreciated by the Firefighters' Fund Trustees as evidenced by their ever-increasing allocation of assets under management to our account. On March 19, 1985, and as an indication of the Firefighters' Trustees' satisfaction with my services, Stock Yards Bank

received more than half of that year's City contribution to the Firefighters' Fund. The Fund's total portfolio for the five years ended March 31, 1985, was ranked in the top four percentile out of one hundred comparable funds nation-wide. As of October, 1985, the Firefighters' Pension Fund had only two money managers, First Kentucky Trust Company and my then-employer, Stock Yards Bank & Trust Company. At no time had I, or any employee of Stock Yards Bank, received any complaint from the Firefighters' Trustees, nor had we received any indication of dissatisfaction with our services, prior to Defendant Abramson assuming his duties as Mayor on January 1, 1986.

7. In January, 1986, Defendant Jay was appointed by Defendant Abramson as the head of the City's Department of Finance and Budget. As a result of this appointment (albeit illegal), Defendant Jay automatically obtained an *ex officio* and voting position on the Firefighters' and Policemen's Pension Fund Boards. In April, 1986, and for the first time, there was a question raised by the Firefighters' Fund as to the fees and commissions charged by Stock Yards Bank. For the first time, the Fund considered a reduction in the monies allocated to Stock Yards Bank. On August 19, 1986, and without any previous discussion with me, the Firefighters' Fund terminated my services through Stock Yards Bank as investment manager. I was advised of this by the Fund Administrator, Granville Ennis.

8. On knowledge and belief, Mary Ann Quesenberry was one of Defendant Abramson's top administrative assistants in 1986. Mrs. Quesenberry's husband, Irv Quesenberry, was then (and still is) a high ranking investment officer at First Kentucky or its investment affiliate. First Kentucky, which had approximately 63% of the assets of the Firefighter's Fund under its investment management responsibility prior to the

termination of the investment management contract with Stock Yards Bank, obtained in short order the additional Fund assets that had previously been allocated to Stock Yards Bank, and now is the ***sole*** investment manager for the Fund.

9. Defendant Abramson faced serious financial problems when he assumed the position of Mayor in January, 1986. The Louisville Courier-Journal reported on February 20, 1986, that the City was due to lose $8 million in federal funds on July 1 and another $3.2 million the following year, see article attached at Tab 2. The articles goes on to state "the funding cuts could actually be deeper [than] those estimates, Stuart Jay, City Director of Finance and Budget, said." The aldermen began calling on the Mayor to detail exactly what he planned to do about the loss in revenue. "Abramson also is cutting salaries for some high-ranking officials, although Jay said he doesn't know yet how much money that will save. . . . And Jay said the administration is looking 'with trepidation' at the possibility of closing some fire houses. ***In addition to trying to cut costs, the administration is looking at ways to bring in more money***."

10. The City, through its representatives and/or appointments, controls four of the nine positions on the Board of the Police Fund. The four "City" positions are the "citizen member," appointed by Defendant Abramson, who is now Mr. Andy Cherry; the Director of Finance and Budget or his designee; the Safety Director; and an alderman appointed by the President of the Board of Aldermen. The City's current director of Finance and Budget, Robert Schwoeppe, was an *ex officio* member of both the Firefighters and the Police Fund Boards prior to 1986. While he was on these Boards, Mr. Schwoeppe voted to hire Stock Yards Bank as investment manager under my account management, consistently voted to

approve our investment strategies, and joined with his fellow Trustees to regularly praise my performance for the Funds. In Suit Nos. 2 and 3, Defendants City and Nevin alleged that my mismanagement and fraudulent dealings extended back through the time of Mr. Schwoeppe's service on the Boards, and yet the City and Nevin never joined as Defendants in Suit Nos. 2 or 3 Mr. Schwoeppe or any of the City appointed Trustees, nor any of the Trustees who served before approximately 1987. In both Suit Nos. 2 and 3, the City and Nevin, while complaining of matters pertaining to the Board as a whole, chose to sue only five of the Trustees, those who were elected by the beneficiaries, and in those lawsuits accused these Trustees of actions that took place even before they were elected! It is interesting to note that the attorney for the Firefighter's Pension Fund, who studied the parallel issues presented by Suit No. 2, commented to the Firefighter's Pension Fund at their May 23, 1990 meeting on the suit, stating "when the City sues the Board of Trustees, it has to be for not performing their duties in 'good faith.' ***Counsel expressed that, in his opinion, since the suit only names elected Trustees and not ex-officio members, the suit is 'capricious.'*** " Counsel for the Firefighter's Pension Fund is Lawrence L. Jones, a partner in the firm of Wyatt, Tarrant and Combs. Wyatt, Tarrant and Combs is defending Hinkle and Halliday and Jay, Unger and Nevin in this action. Hinkle and Boone filed Suit No. 2, and Halliday and Hinkle and Nevin filed Suit No. 3, which was equally "capricious" by naming only the current elected Trustees and not the ex-officio City-related members. The minutes of the May 23, 1990 Firefighter's Pension Fund meeting are attached at Tab 3.

11. Suit No. 1 was dismissed by Judge Knopf on the ground that the City lacked standing to complain about the investment management strategies of the Police Pension Fund.

The City took an appeal to the Supreme Court of Kentucky. I read all of the pleadings as they were received, and I have recently reviewed them. Nowhere does the City argue that it had any kind of affirmative duty to file suit; rather, the City simply argued (and I agreed) that it had enough of an interest by virtue of its contingent funding liability to make contributions to the Plan to have *standing* to file suit.

12. During the time he served as Finance and Budget Director, Stuart Jay did not live within the City of Louisville. State law requires that a director of a city department be a resident of the City. When this information was brought to the City's attention, Jay ultimately resigned. Before Jay's resignation, a newspaper article published on October 21, 1992, stated: "Heavrin questioned whether the law applies to Jay, who is not a city employee. 'Obviously, Stuart Jay's volunteerism to the City puts him in a difference (sic) category,' she said." Another article also stated that "Jay . . . donates his services to the City for $1.00 a year." These articles are attached at Tab 4. Defendant Jay's new job title was "Special Assistant to the Mayor." In a speech to the Louisville Forum on June 10, 1992, Defendant Abramson, referring to Defendant Jay, said "I mean there's, he's not a city employee as such, uh, uh there are no benefits being paid to him, uh, uh, health care or pension or anything. In fact, I haven't even paid him his dollar for the six years." On November 10, 1992, Defendant Heavrin prepared a letter stating "Mr. Jay is a volunteer, and he served without compensation. Therefore, he is not on the city payroll records, position control report or in any city department's budget." I have reviewed the job descriptions for Special Assistant to the Mayor and for Director of Finance and Budget. In neither job description is there any mention of any duty or responsibility to pursue civil actions of any sort on the City's behalf.

13. Defendant Abramson maintains that Mr. Andy Cherry does not speak for him. I do not believe that is true. First, Mr. Andy Cherry was appointed and reappointed to the Board ***by*** Defendant Abramson. Second, so-called "working papers" reflecting Mr. Cherry's comparisons between the Police and the Firefighter's Pension Fund were represented to be private documents as the purported facts were checked out, and yet these so-called "private documents" ended up promptly in the Court record in Suit Nos. 2 and 3. Third, Defendant Jay's son works, or has worked, for a company in which Mr. Andy Cherry was and may still be an owner and of which he is president, Intellect Control Group, Inc. Mr. Jay's son also is or was an owner of this same company. Fourth, Defendant Jay invested $10,000.00 in start-up capital in Intellect Control Group, Inc. Defendant Jay has guaranteed personally notes of Intellect Control Group, Inc., he is or was a one-third owner of Intellect Control Group, Inc., a director of the company and the signatory on the company's bank accounts. Mr. Cherry, who is approximately age 35, is the son of the late Wendell Cherry, with whom Defendant Jay had a long-standing close business and personal relationship. Further, in a recent court hearing, counsel for Defendants City asserted that the City controls four of the Trustees on the Police Pension Board, which would have to include Mr. Cherry.

14. Defendant Boone states in the Affidavit filed in support of his Motion to Dismiss that he "had no further connection of any kind with the lawsuits against the Plaintiffs referred to in the Complaint in this matter after January 1, 1991 . . ." Boone Affidavit signed May 18, 1994, ¶5. He further states "effective January 1, 1991, I ceased to be a partner in the law firm then known as Greenebaum, Boone, Treitz, Magiolo and Brown, and became of counsel." *Id*, ¶2. I know this to be incorrect

from review of the billing records submitted by GTBM to Defendant City which reflect time entries for Defendant Boone as late as May 28, 1991. This time was billed to the City "re: Policemen's Retirement Pension Fund." The time record and the bill are attached at Tab 5. Suit No. 3 was filed on June 13, 1991, by Defendant Nevin. Defendant Nevin provided a Consent To Multiple Representation and Waiver Of Potential Conflict Of Interest, attached at Tab 6, dated June 13, 1991, which acknowledges throughout that Defendant Nevin has asked Defendant Boone, and his firm, to represent him, that they have agreed to do so and that Boone and his firm are then representing the Defendant City, *inter alia*, in Suit Nos. 1 and 2. The Waiver concludes "Nevin nevertheless desires that Boone and Greenebaum represent him, and he has no objection because of any real or possible conflict of interest to Boone and Greenebaum acting as counsel for the City."

15. As testified to by Defendant Nevin in depositions taken in Suit No 3, he would not have filed Suit No. 3 but for the Indemnification Agreement provided to him by Defendant Heavrin and Defendant City. Indemnification Agreement is attached at Tab 7. Defendant Nevin testified that he thinks that the Indemnification Agreement provides indemnification to him if he were ever sued for having filed Suit No. 3, as he has been here. Defendant Heavrin, who was then Nevin's lawyer, apparently did not explain to him that the Indemnification Agreement she had drafted required her other employer, Defendant City, to indemnify Nevin ***only if he is sued for actions he has taken as a City employee***. Since Nevin filed Suit No. 3 in an exclusively private capacity, it could well be that the City has not given him the protection he thought he needed to face the exposure of filing Suit No. 3.

16. I believe from information available to me that Boone and GTBM may have required the City to ***indemnify them*** as a condition of filing Suit No. 2.

17. The Professional Services Agreement between Defendant City and Defendant GTBM, approved by the Aldermen on December 26, 1989, provides as follows:

> **"IV. Employer/Employee Relationship**
>
> It is expressly understood that no employer/employee relationship is created by this agreement nor does it cause attorney to be an officer or official of the government."

18. Shortly after the filing by the City of Suit No. 2, which alleged fraud, excessive fees, etc. against me and Cullinan Associates, Inc., we were the subject of a surprise audit by the United States Securities and Exchange Commission ("SEC"). The SEC was told of and reviewed the allegations in Suit No. 2. After a complete investigation, during which the SEC was on our premises for a full week, we received a clean bill of health.

19. In December, 1990, Defendant Boone and GTBM were sued by Bobby Nichols in Federal District Court. Mr. Nichols alleged that Mr. Boone, who was then the Trustee of Mr. Nichols' retirement plan, had for a number of years taken, without Mr. Nichols' permission or consent, monies in Mr. Nichols' retirement plan. I believe that discovery will reveal that Defendant Boone (who has since taken bankruptcy) had been short of cash for a number of years prior to December, 1990. Defendant Boone and Defendant Jay are close friends and

associates, Defendant Boone and Defendant Abramson are former law partners, and Defendant Boone has been (and may still be) Defendant Jay's personal attorney. The awarding of personal service contracts to GTBM was obviously a financial benefit to Defendant Boone.

20. I have now received documents indicating that Defendants Nevin and City entered in a Settlement Agreement with Stock Yards Bank in Suit Nos. 2 and 3 on April 23, 1993, attached at Tab 9. I knew nothing of the Settlement Agreement at the time it was signed; I had not been told that it was in the making. The first knowledge I had that Defendants City and Nevin had settled with Stock Yards Bank was when I was contacted by a reporter on May 27, 1993. I immediately informed my counsel, and learned that she was similarly uninformed about the fact of the settlement or that it had been pending. My counsel immediately contacted Defendant Halliday and advised him that no *ex parte* Orders should be submitted to the Court accomplishing dismissal of myself or Cullinan Associates, Inc. Despite that request, Defendant Halliday did submit to the Court for *ex parte* signature so-called Agreed Orders of Dismissal, which were entered by the Court on June 1, 1993. These Orders are attached at Tab 10. Since those Orders had been entered without notice and completely unilaterally, the Court set them aside and new Orders of Dismissal were entered on July 7, 1993, attached hereto at Tab 11. At no time did I pay any consideration, either by money or by covenants, for the dismissal of the claims made against me personally in Suit Nos. 2 and 3. At no time did Cullinan Associates, Inc. pay any consideration, either by money or by covenants, for the dismissal of the claims made against it in Suit Nos. 2 and 3.

21. An article concerning the settlement with Stock Yards Bank was published in the Courier-Journal on May 29, 1993,

a copy of which is attached at Tab 12. The reporter, Mary O'Doherty, interviewed Defendant Heavrin. Referring to Defendant Heavrin's comments, the article states "[s]he said the City decided unilaterally to release Cullinan Associates because the firm managed the Fund for only several months and 'the time period was insignificant in terms of the whole picture.' " Based on the article, Defendant Heavrin tried to misrepresent the facts surrounding my complete and unilateral dismissal from the suit, including dismissal of allegations relating to the period of three and a half years after I had left Stock Yards Bank, as some supposed requirement imposed by Stock Yards Bank: "Heavrin said the City decided to release Cullinan from the suit because Stock Yards officials requested that as part of its settlement." The article goes on to quote Stock Yards Chairman, David H. Brooks, who "said that the Bank asked only that Cullinan be released from the suit in his capacity as a former Bank employee. Brooks said the City's press release about the settlement inaccurately suggested that Cullinan and his firm were released as a condition of the settlement." It amazes me that Defendants' lawyers to a person paint the settlement by Stock Yards Bank as an admission of liability. These lawyers, all of whom work for firms large enough to have had the same experience, undoubtedly know that Stock Yards Bank was concerned about its huge legal bill. According to the article:

> "The Bank decided to settle with the City because Bank officials were frustrated with the slow progress of the case, not because he thinks the Bank or Cullinan did anything wrong, Brooks said."
>
> "The Bank has spent more than $175,000 defending itself in the case, and Brooks said he believes it would cost at least $250,000 more to fight the City's claims to the end."

Appendix E

22. Our Complaint has alleged that the Defendants have made the continued employment of Cullinan Associates, Inc., or the terms of the continued employment of Cullinan Associates, Inc., with the Policemen's Pension Fund a condition of settlement in certain meetings which have taken place over the last four years. We have maintained that the Defendants, by threats of personal exposure and by inducements of personal gain, have repeatedly attempted to coerce the Policemen's Fund Trustees into terminating or changing its relationship with me and Cullinan Associates, Inc. I have just learned that this pattern still continues. I have been told that on July 7, 1994, attorney Don Cox, here the attorney for Defendants City, Abramson and Heavrin, and attorney for the City in Suit Nos. 2 and 3, has stated to the attorney for the Pension Fund that any settlement with the Fund (or presumably the five elected Defendant Trustees) will probably need to involve some "face-saving" adjustments relating to Cullinan Associates, Inc.'s role in investment activities for the Pension Fund.

Further, Affiant sayeth not.

s/ R. Keith Cullinan
R. Keith Cullinan, Affiant

Subscribed, sworn to and acknowledged before me by R. Keith Cullinan this __ day of July, 1994.

My commission expires: 11/5/95

s/ illegible
NOTARY PUBLIC, KY STATE AT LARGE

Appendix E

Tab One

The Trustees of the Louisville Policemen's Retirement Fund have a fiduciary responsibility to safeguard and invest the assets of the Fund. In fulfilling this obligation, the Trustees have retained the services of several investment managers, including Cullinan Associates, Inc. (CA). The investment supervision for that portion of the Fund managed by CA is done principally by R. Keith Cullinan, and as a part of CA's investment strategy, Mr. Cullinan makes extensive use of a demonstrated conservative technique known as covered call options writing, designed to produce a higher return on invested assets and to provide some protection against a decline in the market value of such assets.

What is covered call option writing, and how does CA's program work? A call option is a contract that is *sold* by CA to a buyer that grants that *buyer* the right to buy a designated number of shares of a particular stock owned by the Fund at a specified price within a prescribed period of time. Such contracts are referred to as "calls" because they allow the buyer to call away the stock and purchase it at a stated option price. For granting this right to the buyer, the seller (also known as the "writer") of the option (such as the Fund) receives a payment from the buyer known as the premium.

Options have been bought and sold in the United States for more than a century and even longer in Europe, but it was only with the establishment in 1973 of the Options Clearing Corporation that they achieved a very liquid market. Since then, the Chicago, New York, American and several other exchanges have established major option markets.

Here is an example of a simple options writing transaction (excluding brokerage commissions): Assume the stock of XYZ

Appendix E

Corporation is selling at $28.00 a share. CA, as investment manager of the Fund, decides to buy 1,000 shares of XYZ and then to write an option on that stock exercisable at a price of $30.00 per share within a set time period. Assume further that the option premium received for this option is $1.00 per share, or a total premium of $1,000. Thus, the sale of the option brings to the Fund an *immediate* $1,000. The amount of this premium is determined by a variety of factors: supply and demand, the length of time until the expiration of the option, and the market value of the underlying stock (which in turn is influenced by such things as general market conditions, prevailing interest rates, political unrest, etc.).

What then happens? (1) If the market value of XYZ *rises* to $30.00 or above and the option is exercised by the buyer, the 1,000 shares of XYZ stock will be sold to the buyer at a price of $30.00 per share, resulting in a profit on the stock of $2.00 per share or $2,000.00 for the Fund. In addition, the Fund will *keep* the $1,000.00 premium that it received from the option buyer at the time the transaction was entered into, so the Fund's total profit comes to $3,000. (2) If the market value of the stock *declines*, the option will expire worthless, and the Fund will keep the premium it received ($1.00 per share or $1,000.00 in the example), serving to offset part (or perhaps all) of the stock's paper decline in market value. (3) If the stock price remains *unchanged*, the Fund is, of course, $1,000.00 better off for having written the option, since the option will expire worthless and the Fund will keep the premium ($1,000.00) it already received. Thereafter, another option for an additional period of time can be written in order to produce additional premium income for the Fund.

Moreover, call option writers (such as CA on behalf of the Fund) *can change their minds* to react to changing

circumstances. Once created, an options contract may be purchased or sold by anyone, including the original writer. Thus, if after entering into an option contract, CA determines that it would be in the best interest of the Fund to do so, it can buy back the option originally sold (often at a lower price than was originally received, since time will have run in the writer's favor). This offsetting transaction removes the obligation to sell the underlying shares, and restores the Fund to its original status as simply an owner of the stock.

Thus, an option writer always has the alternative to (1) let the outstanding option run its course and expire or be exercised, or (2) close the option position by buying it back in order to then implement some appropriate current action.

Why does CA invest solely in high-quality stocks and write options on them? Based on history, it can be reasonably assumed that common stocks will, over the long term, provide superior returns from a combination of appreciation and dividends. CA agrees with this premise, but also believes that the strategy of writing options on the securities in portfolios under its care will *enhance* this return even more, and that such a strategy is an especially prudent way to do this at reduced risk. Option writers such as CA seek *additional income* from the investment assets, and a degree of *protection* against the downside risks inherent in any investment. An option writer produces internally-generated positive cash flow from the option premium, and reduces risk to the extent of this premium. Thus, if the underlying stock declines in value, some (or perhaps all) of that decline will be offset by the amount of the premium received from selling the option.

Appendix E

In summary, CA's use of a carefully administered integrated option writing program for the Fund and for other portfolios under its management has produced consistently favorable results with reduced risk. This approach to conservative investing is particularly important to Funds having significant payout requirements (such as pensions, foundations, etc.), as to which even temporary market declines can be particularly devastating regarding both asset value and payout capability. CA's program can thus provide supplemental income to meet payout requirements, and thereby reduce (or eliminate altogether) the need to sell securities at depressed prices during poor market conditions.

Appendix E

Tab Two

2/20/86

Aldermen Ask Mayor To Detail Impact Of Revenue Losses

By LESLIE SCANLON, Staff Writer

Louisville aldermen have asked Mayor Jerry Abramson to specify what he'd most like to spend city money on in the next few months, and what he might be willing to give up.

And they want the administration to explain what impact a 5 percent to 10 percent budget cut would have on city services.

In a mid-year budget review last night, the aldermen heard grim news: the city will lose about $8 million in federal funds in the fiscal year beginning July 1, and another $3.2 million the following year.

The funding cuts could actually be deeper those estimates, Stuart Jay, city director of finance and budget, said.

Third Ward Alderman Michael Carrell — who as chairman of the Appropriations, Budget and Finance Committee had called for last night's review — said he wants to know what the administration plans to do about the loss in revenue.

Jay said the administration has already begun to try to cut costs. Abramson has installed a selective hiring freeze, meaning no one can be hired by city government unless the mayor personally approves.

Appendix E

Abramson also is cutting salaries for some high-ranking officials, although Jay said he doesn't know yet how much money that will save. Fifty city employees are losing their take-home cars.

And Jay said the administration is looking "with trepidation" at the possibility of closing some fire houses.

In addition to trying to cut costs, the administration is looking at ways to bring in more money. One possibility, Jay said, would be to increase fees and fines that city government charges.

Jay also said the city needs to assess whether it can continue to pay about $2.7 million in subsidies to what he called "an enormous list" of agencies and community groups.

Carrell asked for more information, to be presented at the committee's March 5 meeting if possible. He asked the administration to:

✓ Explain how a "substantial" budget cut would affect each city department.

✓ List capital projects for which $25,000 or more has been appropriated but has not been spent.

✓ Put priorities on a list of funding requests that are either pending before the aldermen or may be introduced in the next several months.

A budget report presented last night stated that pending requests come to more than $307,000, and potential requests to

more than $2.9 million. The latter includes more than $1.8 million in overruns projected in a number of departments.

Picking out one example from the list, Carrell said that spending $175,000 to add parking space at the Museum of History and Science "doesn't look too bad" right now, considering that the city has more than $4 million left it can spend this fiscal year. But when the federal budget cuts hit, he said, that expenditure might not look wise at all.

Budget analyst Larry Lenahan said that if all the pending and potential projects are funded, the city's General Fund would be drawn down to about $1 million, from the $4.2 million available now.

Appendix E

Tab Three

PENSION REPORT

Upon motion by Mr. Unger, seconded by Mr. Graves, the application for widow's benefits of Ms. Catherine Button, whose husband Mr. Jack R. Button died on April 17, 1990, was approved.

Upon motion by Mr. Hammack, seconded by Mr. Graves, the application for widow's benefits of Ms. Harriet E. Green, whose husband Mr. David N. Green died on April 10, 1990, was approved.

Upon motion by Mr. Lile, seconded by Mr. Graves, the application for widow's benefits of Ms. Carolyn M. Johnson, whose husband Mr. Wilburn H. Johnson died on April 14, 1990, was approved.

The Board was informed Ms. Carrie E. Taylor/Anthony had made her first of five payments. A check was received from Ms. Anthony prior to the first of the month but could not be cashed due to insufficient funds. After a week there were sufficient funds to cover the check. The administrator advised Ms. Anthony this was not an acceptable procedure and suggested sending money orders for payment. He will take necessary action to see the full amount is recovered and keep the Board informed.

Appendix E

OLD BUSINESS

Mr. Jones reported on the Louisville Police Pension Fund vs. City of Louisville hearing held today, May 23, 1990. The Judge reinstated the case and no dates have been set for a hearing. Discussion turned to the City v. Louisville Police Pension Fund. President Bowman expressed his concern regarding the liability of a trustee. The dishonesty bond covers $2,000,000.00 for employee and trustee dishonesty only and the City Ordinance indemnifies the trustees only for performing their duties in "good faith." When the City sues the Board of Trustees it has to be for not performing their duties in "good faith." Counsel expressed that, in his opinion, since the suit only names elected trustees and not ex-officio members, the suit is "capricious." Extensive, intense discussion followed.

Mr. Ennis read a letter from the secretary of the Kentucky State Revenue Cabinet stating that the Fund is state tax exempt and that the deductions may be now discontinued.

The Board was informed that all available information has been compiled as it relates to H.B. 305. There are approximately 800 people who have been employed by the Louisville Division of Fire and terminated that employment. Discussion ensued.

Appendix E

Tab Four

RETIRED POLICE OFFICERS CLAIM FINANCE DIRECTOR'S APPOINTMENT IS INVALID

By MARY O'DOHERTY,

Staff Writer

Nestled on a wooded hillside off Mockingbird Hill Road, the gracious, three-story brick home of city Finance and Budget Director Stuart Jay has become a bone of contention for a group of retired Louisville police officers.

Jay lives in Mockingbird Valley an affluent sixth-class city in eastern Jefferson County. The officers say his address — although less than 1,000 feet outside Louisville's city's limits — may make his appointment as the city's chief financial officer invalid.

State law says the director of a city department must be a resident of that city. Yesterday board members of the Louisville Policeman's Retirement fund decided to ask city officials to look into the matter.

As the city's chief financial officer, Jay or his designee sits on the board of the pension fund. Some officials of the pension fund, who are embroiled in a complicated web of lawsuits with the city over the fund's operation and related matters, say the question of Jay's residency could mean big legal problems for the city.

Mayor Jerry Abramson appointed Jay in 1986. If Jay's appointment is found invalid, pension-fund officials say, it could

affect past and present city contracts and agreements that Jay has been involved with.

Although some might call the retirees' concerns highly technical, many of the retired police officers are indignant about the matter.

"We've been taught throughout our careers that we must abide by the law," said retired city police Officer Anthony Trusty, a stockbroker whom the city has sued. "If he's serving in violation of the law, then it's wrong."

Described in a 1983 Courier-Journal Magazine article as one of Louisville's young millionaires, Jay was chairman of the Louisville-based RETS Electronic Institute until he sold it in 1985. Jay, a socially active businessman and investor, donates his services to the city for $1 a year.

Yesterday, Jay refused to discuss the matter or speculate about why the retired officers are so interested in the validity of his appointment.

City officials refused yesterday to answer questions about the pending litigation or Jay's role in it. But the officials, who promised yesterday to research the matter, said concerns of the pension-fund officials are overblown.

"We don't think it's a problem," city Law Director Tina Heavrin said. Heavrin couldn't say whether the questions raised by the retired police officers mean Jay will have to step down. But, she said, even if Jay's appointment were invalidated, it wouldn't affect city matters in which he was involved.

Appendix E

Although the statute clearly says that a city department head should be a city resident, Heavrin questioned whether the law applies to Jay, who is not a city employee. "Obviously, Stuart Jay's volunteerism to the city puts him in a difference category," she said.

Thurman Senn, an attorney for the pension fund, said its board has an obligation to raise the question because the board may not be properly constituted.

Since 1989, five lawsuits have been filed by the city, the pension fund and officers who say they are entitled to some of the fund's money.

One of the suits accuses the five officers on the pension-fund board as well as its investment advisory firm of mismanaging the fund and allowing it to be milked for excessive fees by advisers and brokers.

R. Keith Cullinan, who manages about 60 percent of the fund's $34 million assets, is the source of the board's concerns about Jay. Cullinan, a prime target in the city's litigation, said he began researching the residency issue late last year after he learned that Jay lived in Mockingbird Valley.

In August, Cullinan obtained an opinion from the state attorney general that bolstered his contention that Jay's appointment violated state law. (Attorney general's opinions are strictly advisory.)

Many of the retired officers have a keen interest in Jay's appointment because they blame him for the pension-fund's legal troubles. They say Jay began interfering with the fund as soon as he became finance and budge director.

Appendix E

Most of the 390 pensioners "see Stuart Jay as the source of all our troubles," said Sam Long, a retired sergeant. "He's the one who has been asking all the questions."

Appendix E

Tab 5

LAW OFFICES

GREENEBAUM BOONE TREITZ MAGGIOLO & BROWN
2700 First National Tower
101 South Fifth Street
Louisville, Kentucky 40202-3174
(502) 589-4100

Tax ID NO 61-0937860

RE: *** MATTER NUMBER - 01

5/31/91	CVH	3.60	Work on *** meeting with *** and ***.
5/31/91	LIA	.70	Review of research *** conference ***.
5/31/91	SDH	4.40	Conference with *** and research re *** telephone conference with *** review ***.
5/31/91	MSM	.30	Review and file correspondence; set up research ***.
6/02/91	CVH	1.00	Letter to *** letter to *** work on ***.
6/03/91	ECC	5.00	Research for *** re: ***.
6/03/91	MSM	.30	Review and file correspondence; index and file ***.
6/03/91	CVH	3.50	Meeting with *** and *** letter to *** prepare ***.
6/04/91	ELM	2.90	Attended hearing on motions to compel and to strike; ***.
6/04/91	MSM	.30	Update pleadings file; calculate and calendar PRF's response date to City's request for admission.

Appendix E

6/04/91	CVH	1.80	Prepare for and attend hearing of motions to strike, compel discovery and for protective order.
6/05/91	MSM	.20	***.
6/06/91	ELM	4.90	Reviewed and revised *** summarized and revised research results re: ***.
6/07/91	CVH	2.50	Review ***.

PROFESSIONAL SERVICES of William C. Boone:

5/28/91	WCB	1.00	Conference with *** regarding status conference with *** regarding ***.

Appendix E

LAW OFFICES
GREENEBAUM BOONE TREITZ MAGGIOLO & BROWN
2700 First National Tower
101 South Fifth Street
Louisville, Kentucky 40202-3174
(502) 589-4100

Tax ID NO 61-0937860

City of Louisville, City Hall
601 W. Jefferson St., Ste. 311
Louisville, Kentucky

INVOICE # 91606

Attn: Earl M. Unger

JUNE 12, 1991

CLIENT NUMBER — 02432-00

FOR PROFESSIONAL SERVICES RENDERED
THROUGH JUNE 7, 1991

RE: Policemen's Retirement Pension Fund
MATTER NUMBER - 01

PROFESSIONAL SERVICES OF GREENEBAUM BOONE TREITZ MAGGIOLO AND BROWN:	13,415.50
PROFESSIONAL SERVICES OF WILLIAM C. BOONE: [$100 an hour *not* $220 an hour]	~~220.00~~ 100.00
TOTAL PROFESSIONAL SERVICES	~~13,635.50~~ 13,515.50

Appendix E

COSTS ADVANCED

2/25/91	Long Dist. Phone Charge	.60	
5/09/91	Lexis computer research	50.54	
5/23/91	Lexis computer research	11.37	
5/05/91	Videotape of hear 6/4/91	15.00	
5/07/91	In-house photocopying	52.80	
	TOTAL COSTS ADVANCED		130.31
			~~13,765.81~~
	INVOICE TOTAL		13,645.81

[pay this ?]

Appendix E

Tab Six

CONSENT TO MULTIPLE REPRESENTATION AND WAIVER OF POTENT CONFLICT OF INTEREST

John H. Nevin ("Nevin"), a member of the Policemen's Retirement Fund of the City of Louisville (the "Fund"), has asked William C. Boone, Jr. ("Boone") and Greenebaum Boone Treitz Maggiolo & Brown ("Greenebaum") to represent him, and Boone and Greenebaum have agreed to represent him, in an action against certain investment managers and advisers, stockbrokers, and trustees of the Fund. Nevin has been advised that Boone and Greenebaum represent the City of Louisville (the "City") in three actions styled *City of Louisville v Stock Yards Bank and Trust Co., et al.*, No. 90CI-03253 (Jeff Cir. filed Apr. 19, 1990), *Policemen's Retirement Fund of the City of Louisville v. City of Louisville*, No. 89CI-08065 (Jeff. Cir. filed Oct. 25, 1989), and *Baldwin, et al. v. Policemen's Retirement Fund of the City of Louisville, et al*, No. 91CI-01046 (Jeff Cir. filed Feb. 13, 1991) (the "Pending Cases").

Nevin acknowledges that Boone and Greenebaum have explained to him that, while they are not aware of any conflict of interest in representing him and the City in the Pending Cases, a conflict of interest may arise at a later time, or additional facts may come to the attention of Boone and Greenebaum, which indicate an actual conflict exists. Nevin also acknowledges that Boone and Greenebaum have explained to him and he understands the possibility that a conflict of interest on the part of his attorneys, Boone and Greenebaum, may arise in that what may be or seem to be in his best interests may not be or seem not to be in the best interests of the City. Conversely, Nevin also acknowledges that Boone and Greenebaum have explained

to him and he understands the possibility that a conflict of interest may arise in that what may not be or seem not to be in his best interests may be or seem to be in the best interests of the City

In addition. Nevin has been advised by Boone and Greenebaum that Greenebaum represents Shearson Lehman Mortgage Corporation ("Shearson Mortgage"). Shearson Mortgage is a wholly owned subsidiary of the American Express Company. Shearson Lehman Hutton Inc. ("Hutton"), a defendant to the action styled *City of Louisville v. Stock Yards Bank & Trust Co.. et al.*, No. 90CI-03235 (Jeff. Cir. filed Apr. 19, 1991) and a defendant to the action to be brought by Nevin, is also a wholly owned subsidiary of the American Express Company. Nevin, Boone and Greenebaum understand that Shearson Mortgage and Hutton are separate and distinct corporate entities.

Having had the above disclosed to him, Nevin recognizes that a potential conflict exists. Nevin fully understands the implications of the representation and the advantages and risks involved. Nevin nevertheless desires that Boone and Greenebaum represent him, and he has no objection because of any real or possible conflict of interest to Boone and Greenebaum acting as counsel for the City.

Dated June 13, 1991.

s/ John H. Nevin
John H. Nevin

Appendix E

Tab Seven

CITY OF LOUISVILLE
DEPARTMENT OF LAW
Room 200, City Hall • Louisville, KY 40202-2771
(502) 625-3511

June 10, 1991

Mr. John H. Nevin
4508 Dearing Ave.
Louisville, KY. 40213

Dear Mr. Nevin:

You have asked whether the City would agree to indemnify you for a claim of alleged malicious prosecution or violation of Kentucky Rule of Civil Procedure 11 arising from your prosecution of a lawsuit against Stock Yards Bank & Trust Co., Cullinan Associates, Inc., R. Keith Cullinan, Shearson Lehman Hutton, Inc., C. Theodore Phillips, Anthony R. Trusty, Bobby W. Branham, Thomas H. Carrico, Billy R. Epperson, John L Winstead, Sr., and Brent O. Hardin.

Should a claim for alleged malicious prosecution or Rule 11 or any other type of action be brought against you as a result of the above-mentioned lawsuit to the extent that such liability is attributable to an act or omission of the City, then pursuant to Louisville Code of Ordinance § 34.082(c) the City would agree to pay such claim and costs of defending same.

Appendix E

Very truly yours,

s/ Christina Heavrin
Christina Heavrin
Director of Law

CH/kv:30122

Appendix E

Tab Eight

AGREEMENT

PSC-90-2561

THIS PROFESSIONAL SERVICE AGREEMENT, entered into by and between the CITY OF LOUISVILLE, herein referred to as "CITY" and GREENEBAUM, BOONE, TREITZ, MAGGIOLO, REISZ & BROWN, Attorneys at Law, with offices located at 2700 First National Tower, Louisville, Kentucky 40202, herein referred to as "ATTORNEY",

WITNESSETH:

WHEREAS, the City is in need of certain professional services with respect to the practice of law, and

WHEREAS, the Attorney, a licensed professional, has been determined by the City to have the necessary experience, expertise and licensed qualifications to provide those services,

NOW, THEREFORE, it is agreed by and between the parties hereto as follows:

I. *SCOPE OF PROFESSIONAL SERVICES*

A. Attorney shall, at the request of the City, provide services under the terms of this licensed professional agreement. The Attorney's work product may be reviewed from time to time by the City for purposes of insuring that the services provided are within the scope of this agreement.

B. Attorney, while performing the services rendered pursuant to this agreement, may incidental thereto utilize agents or employees of such Attorney. However, such use must be documented in the monthly invoice submitted for those services rendered.

C. If from time to time Attorney needs to utilize the records or personnel of the City relative to performing the services required of this contract, then Attorney shall notify the proper agent of the City of this need and arrangements may be made for that contingency. However, at no time shall the City make available its resources without the full consent and understanding of both parties.

The services requested of Attorney shall include but not be limited to the following:

Attorney shall perform litigation services and such other duties as may be assigned by the Director of Law. These services shall include, but not be limited to, preparation of briefs and other legal memoranda, appearances for oral argument, preparation of cases for appeal, if necessary, and analysis and advice with respect to Attorney's position relative to all pending matters.

II. *FEES AND COMPENSATION*

A. Attorney shall be reimbursed for professional services rendered according to the terms of this agreement in an amount equal to ONE HUNDRED DOLLARS ($100.00) per hour. Total compensation payable to Attorney for services rendered pursuant to this agreement, including out-of-pocket expenses, shall not exceed the sum of FIFTY THOUSAND DOLLARS ($50,000.00).

Appendix E

B. Unless otherwise agreed to by the Director of Law, services shall be rendered and payment therefor shall be made at monthly intervals throughout the duration of this agreement. Payment shall only be made pursuant to a detailed invoice presented monthly, which invoice shall indicate a descriptive daily accounting of the hours expended in service under the contract, the particular nature of such service and out-of-pocket expenses. In the event payment is made in lump sum at the end of the service period, Attorney's final invoice shall indicate a descriptive daily accounting of hours expended as described heretofore.

III. *DURATION*

A. This is a licensed professional service contract which shall begin on the 1st day of December, 1989 and shall continue through and including the 30th day of June, 1990.

B. This contract may be terminated by submitting thirty (30) days' written notice to the non-terminating party of such intent to terminate.

C. In the event of termination, payment for services complete up to and including date of termination shall be based upon work completed at the rates identified in this contract.

IV. *EMPLOYER/EMPLOYEE RELATIONSHIP*

It is expressly understood that no employer/employee relationship is created by this agreement nor does it cause Attorney to be an officer or official of the government. By executing this agreement, the parties hereto certify that its performance will not constitute or establish a violation of any

statutory or common law principle pertaining to conflict of interest, nor will it cause unlawful benefit or gain to be derived by either party.

V. *ORDINANCE COMPLIANCE*

It is hereby understood that the parties are bound by the provisions of Chapter 37 of the Louisville Code of Ordinances as it applies to licensed professionals. Chapter 37 of the Louisville Code of Ordinances is expressly incorporated herein.

VI. *CONFLICT OF INTEREST*

Unless otherwise agreed to in writing by the Director of Law or the Mayor, neither Attorney, nor the partners or associates or persons sharing office space with Attorney, shall have any interest in any matter requiring legal advice or consultation adverse to the City, its agencies, departments, legal subdivisions or employees acting within the scope of their employment. Unless disapproved by the Director of Law, this provision does not apply to a matter with respect to the collection of City taxes or open records or open meetings matters if Attorney reports such matter in writing to the Director of Law and Attorney's services for the City do not relate to collecting City taxes or advising the City with regard to open records or open meetings matters, as the case may be.

VII. *RECORDS-AUDIT*

Attorney shall maintain during the course of the work, and retain not less than four years after completion thereof, complete and accurate records of all of Attorney's costs which are chargeable to the City under this contract; and the City shall

have the right, at any reasonable time, to inspect and audit those records by authorized representatives of its own or of any public accounting firm selected by it. The records to be thus maintained and retained by Attorney shall include (without limitation): (a) payroll records accounting for total time distribution of Attorney's employees working full or part time on the work (to permit tracing to payrolls and related tax returns), as well as cancelled payroll checks, or signed receipts for payroll payments in cash; (b) invoices for purchases receiving and issuing documents, and all the other unit inventory records for Attorney's stores stock or capital items; and (c) paid invoices and cancelled checks for materials purchased and for subcontractors' and any other third parties' charges.

VIII. *MALPRACTICE COVERAGE*

Attorney shall purchase and maintain at his/her own expense a Lawyer's Professional Liability insurance policy, which includes a minimum Limit of Liability of $100,000 for each Wrongful Act. In the event that the Attorney's policy is written on a "Claims Made" Form, the Attorney shall, after work has been completed, furnish evidence that the liability coverage has been maintained for at least five (5) years after completion of work, either by submitting renewal policies with a Retroactive Date of not later than the date work commenced under this contract, or by evidence that the Attorney has purchased an Extended Reporting Period Endorsement that will apply to any and all claims arising from work performed under this contract. Attorney shall provide proof of such coverage by submitting either a copy of the Policy or a Certificate of Insurance to be reviewed and approved by the City's Risk Management Division prior to commencement of this contract. Attorney shall provide copies of renewal policies or Certificates of Insurance on an

annual basis to the City so that continuous coverage is provided during the term or this contract.

IX. *HOLD HARMLESS*

The Attorney shall indemnify and hold harmless the City of Louisville, its agents and employees from and against all claims, damages, losses and expenses including attorneys' fees, arising out of or relating from the performance of the contract unless such claim, damage, loss or expense is caused by any negligent act or omission or the willful misconduct of the City of Louisville or its employees acting within the scope of their employment.

X. *REPORTING OF INCOME*

The compensation payable under this agreement is subject to federal, state and local taxation. Regulations of the Internal Revenue Service require the City to report all amounts in excess of $600.00 paid to non-corporate contractors. Attorney agrees to furnish the City with its taxpayer identification number (TIN) prior to the effective date of this contract. Attorney further agrees to provide such other information to the City as may be required by the IRS or the State Department of Revenue.

WITNESS the agreement of the parties hereto by their signatures affixed hereon.

APPROVED AS TO FORM:

s/ Frank X. Quickert, Jr.
FRANK X. QUICKERT, JR.
DIRECTOR OF LAW

Appendix E

APPROVED BY RESOLUTION
OF THE BOARD OF ALDERMEN
RES. 303 SERIES 1987

s/ Linda C. Jones, C.B.A
Date: 12-26-89

CITY OF LOUISVILLE

s/ Jerry E. Abramson
JERRY E. ABRAMSON, MAYOR
Date: 12-11-89

GREENEBAUM, BOONE, TREITZ,
MAGGIOLO, REISZ & BROWN
ATTORNEYS AT LAW

By: s/ William C. Boone
Date: 12-7-89

Appendix E

Tab Nine

RELEASE AND SETTLEMENT AGREEMENT

This Release and Settlement Agreement (the "Release") is entered into as of April 23, 1993, between the City of Louisville (the "City"), John H. Nevin ("Nevin"), and Stock Yards Bank & Trust Company ("Stock Yards"). The City, Nevin, and Stock Yards are collectively referred to as the "Parties".

1. The City and Nevin forever release and discharge Stock Yards and all present and former directors, officers, employees, agents, attorneys, and representatives of Stock Yards, including R. Keith Cullinan, and all other entities leased, operated, controlled by or affiliated with Stock Yards, including insurers, underwriters, adjusters, and holding companies (collectively referred to as "Releasees"), of and from any and all actions, causes of action, claims and demands, express or implied warranties or representations, costs, expenses, compensation, attorneys' fees, and interest on account of, or in any way growing out of, resulting or to result from any actual or alleged negligence error, misstatement, misleading statement, act or omission, or neglect or breach of duty by Releasees, including any and all known and unknown injuries and damages relating to any agreement, oral or written, express or implied, between Stock Yards and the Policemen's Retirement Fund of the City of Louisville (the "Fund"), related to the subject matter of the consolidated lawsuits styled *John H. Nevin v. Stock Yards Bank & Trust Co., Cullinan Associates, Inc., R. Keith Cullinan, Shearson Lehman Hutton, Inc., C. Theodore Phillips, Anthony R. Trusty, Bobby W. Branham, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr., and Brent 0. Hardin*, 91-CI-03889, Jefferson Circuit Court, Division Fifteen, and *City of Louisville v. Stock Yards Bank & Trust Co., Cullinan*

Appendix E

Associates Inc., R. Keith Cullinan, Searson Lehman Hutton, Inc., C. Theodore Phillips, Anthony R. Trusty, Bobby W. Branham, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr. and Brent 0. Hardin, 90-CI-03253, Jefferson Circuit Court, Division Eight (collectively referred to as the "Lawsuits").

2. The City and Nevin agree not to cause, solicit, induce, encourage or assist any member or beneficiary of the Fund to assert any claim or bring any cause of action against Releasees related to the subject matter of the Lawsuits, and further agree not to pay for, reimburse or finance the legal fees or costs or expenses, or provide legal services, in connection with any such claim or action, except as required by statute or ordinance.

3. Stock Yards, its affiliates, subsidiaries, holding companies, successors and assigns, forever release and discharge the City, its officers, employees, agents, attorneys, and representatives, and Nevin, of and from any and all actions, causes of action, claims and demands, express or implied warranties or representations, costs, expenses, compensation, attorneys' fees, and interest on account of, or in any way growing out of, any and all known and unknown injuries and damages resulting or to result from any actual or alleged error, misstatement, misleading statement, act or omission, or neglect or breach of duty by the City, its officers, employees, agents, attorneys, and representatives, and Nevin, his agents, attorneys, and representatives, related to the subject matter of the Lawsuits.

4. Shearson Lehman Brothers, Inc., C. Theodore Phillips, Anthony R. Trusty, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr., Brent O. Hardin, and Bobby W. Branham are not parties to the Release. It is expressly understood and

agreed that the City and Nevin by executing the Release do not release, compromise or impair any claims, alleged or unalleged, known or unknown, which the City and Nevin have or may have, including the claims alleged in the Lawsuits, against Shearson Lehman Brothers, Inc., C. Theodore Phillips, Anthony R. Trusty, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr., Brent 0. Hardin, and Bobby W. Branham, which the City and Nevin specifically reserve.

5. The Parties shall, within 10 days of receipt by the City of Payment of $175,000 from Stock Yards, cause their counsel to execute and tender the agreed order of dismissal (a copy of which is attached as "Exhibit A"), or such other filings with the Court as may be required to obtain dismissal with prejudice, of any and all claims asserted by the City and Nevin against the Releasees in the Lawsuits, the Parties to bear their own fees and costs.

6. This is a compromise of a disputed claim of liability and the City and Nevin understand that Stock Yards does not admit any liability by reason hereof.

7. The Parties each represent and warrant that they have the right and the authority to execute this Release; that they have not sold assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations, or causes of action referred to in this Release; and that the undersigned have full and complete authority to execute and deliver this Release.

8. The Parties represent and warrant that this Release has been read and understood by persons authorized by the Parties to do so and that the Release has been executed by persons duly authorized by the Parties to do so.

Appendix E

9. For convenience, the Release may be executed in counterparts and each executed counterpart shall be deemed an original and all of the counterparts together shall constitute one original of the same instrument.

10. This Release is to be construed and interpreted in accordance with the laws of the Commonwealth of Kentucky.

THIS IS A FULL RELEASE. I HAVE READ IT BEFORE SIGNING.

s/ John H. Nevin
JOHN H. NEVIN

STATE OF KENTUCKY)
)ss
COUNTY OF JEFFERSON)

I, the undersigned notary public, in and for the Commonwealth and county aforesaid, do hereby certify that the foregoing instrument was this date executed before me by John H. Nevin, individually, party thereto, who acknowledged the same to be his act and deed for the uses and purposes therein set forth.

Witness my hand and official seal of office this 21st day of April, 1993.

My Commission expires: December 24, 1994.

s/ Kay S. Vaughn
NOTARY PUBLIC
KENTUCKY - STATE AT LARGE

Appendix E

THIS IS A FULL RELEASE. I HAVE READ IT BEFORE SIGNING.

s/ Christina Heavrin
Christina Heavrin, Director of Law
On behalf of
CITY OF LOUISVILLE

STATE OF KENTUCKY)
)ss
COUNTY OF JEFFERSON)

I, the undersigned notary public, in and for the Commonwealth and county aforesaid, do hereby certify that the foregoing instrument was this date executed before me by Christina Heavrin, Director of Law, on behalf of the City of Louisville, a party thereto, who acknowledged the same to be her act and deed for the uses and purposes therein set forth.

Witness my hand and official seal of office this 22nd day of April, 1993.

My commission expires: December 24, 1994.

s/ Kay S. Vaughn
NOTARY PUBLIC
KENTUCKY - STATE AT LARGE

Appendix E

THIS IS A FULL RELEASE. I HAVE READ IT BEFORE SIGNING.

s/ David H. Brooks, Chairman
On Behalf of
STOCK YARDS BANK
& TRUST COMPANY

STATE OF KENTUCKY)
)ss
COUNTY OF JEFFERSON)

I, the undersigned notary public, in and for the Commonwealth and county aforesaid, do hereby certify that the foregoing instrument was this date executed before me by David H. Brooks, of Stock Yards Bank & Trust Company on behalf of Stock Yards Bank & Trust Company.

s/ Jennie Estes
NOTARY PUBLIC
KENTUCKY - STATE AT LARGE

My Commission expires: 11-9-94

Appendix E

Tab Ten

JEFFERSON CIRCUIT COURT
DIVISION EIGHT(8)

NO. 90-CI-03253

CITY OF LOUISVILLE

PLAINTIFF

v.

STOCK YARDS BANK & TRUST COMPANY, et al.

DEFENDANTS

Consolidated With

NO. 91-CI-03889

JOHN H. NEVIN

PLAINTIFF

v.

STOCK YARDS BANK & TRUST COMPANY, et al.

DEFENDANTS

AGREED ORDER OF DISMISSAL OF STOCK YARDS BANK & TRUST COMPANY AND R. KEITH CULLINAN

This order having been agreed to and tendered by plaintiffs City of Louisville (the "City") and John H. Nevin, and defendant

Appendix E

Stock Yards Bank & Trust Company ("Stock Yards"), the Court being duly and sufficiently advised,

IT IS HEREBY ORDERED that, pursuant to CR 41.01(2), the claims of the City and Nevin against Stock Yard and defendant R. Keith Cullinan, alleged in the actions identified above, are dismissed with prejudice, each to bear its own costs, including attorneys' fees. This order is not intended to, and does not, dismiss, release, compromise or impair any claims, alleged or unalleged, known or unknown, which the City and Nevin have alleged or may allege in the actions identified above against defendants Shearson Lehman Brothers, Inc., C. Theodore Phillips, Anthony R. Trusty, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr., Brent O. Hardin, and Bobby W. Branham.

Entered this 28th day of May, 1993.

s/ Thomas J. Knopf
Thomas J. Knopf, Judge
Jefferson Circuit Court

Agreed to and tendered by:

s/ Culver V. Halliday
Samuel D. Hinkle IV
Lester I. Adams, Jr.
Culver V. Halliday
GREENEBAUM TREITZ BROWN
& MARSHALL, P.S.C.
2700 First National Tower
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and

Christina Heavrin
Director of Law
Winston E. King
Assistant Director of Law
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601 West Jefferson Street
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Counsel for Plaintiffs
City of Louisville and
John H. Nevin

May 28, 1993

s/ Thomas C. Hundley
Lively M. Wilson
Thomas C. Hundley
Catherine Murr Young
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400 West Market Street
Louisville, Kentucky 40202-3352

Counsel for Defendant
Stock Yards Bank & Trust Company

Appendix E

Tab 10 – Continued

JEFFERSON CIRCUIT COURT
DIVISION EIGHT(8)

NO. 90-CI-03253

CITY OF LOUISVILLE

PLAINTIFF

v.

STOCK YARDS BANK & TRUST COMPANY, et al.

DEFENDANTS

Consolidated With

NO. 91-CI-03889

JOHN H. NEVIN

PLAINTIFF

v.

STOCK YARDS BANK & TRUST COMPANY, et al.

DEFENDANTS

Appendix E

ORDER OF DISMISSAL OF R. KEITH CULLINAN AND CULLINAN ASSOCIATES, INC. WITH PREJUDICE

This Order having been tendered by plaintiffs City of Louisville (the "City") and John H. Nevin ("Nevin"), the Court being duly and sufficiently advised.

IT IS HEREBY ORDERED that, pursuant to CR 41.01(2), the claims of the City and Nevin against defendants R. Keith Cullinan and Cullinan Associates, Inc., alleged in the actions identified above, are dismissed with prejudice. The Order is not intended to, and does not, dismiss, release, compromise or impair any claims, alleged or unalleged, known or unknown, which the City and Nevin have alleged or may allege in the actions identified above against defendants Shearson Lehman Brothers, Inc., C. Theodore Phillips, Anthony R. Trust, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr., Brent O. Hardin, and Bobby W. Branham.

Entered this 28 day of May, 1993.

s/ Thomas J. Knopf, Judge
Jefferson Circuit Court

Tendered by:

s/ Culver V. Halliday
Samuel D. Hinkle IV
Lester I. Adams, Jr.
Culver V. Halliday
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& MARSHALL, P.S.C.
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Counsel for Plaintiffs
City of Louisville and
John H. Nevin

May 28, 1993

Appendix E

Tab Eleven

JEFFERSON CIRCUIT COURT
DIVISION EIGHT(8)

NO. 90-CI-03253

CITY OF LOUISVILLE

PLAINTIFF

v.

STOCK YARDS BANK & TRUST COMPANY, et al.

DEFENDANTS

Consolidated With

NO. 91-CI-03889

JOHN H. NEVIN

PLAINTIFF

v.

STOCK YARDS BANK & TRUST COMPANY, et al.

DEFENDANTS

ORDER OF DISMISSAL OF R. KEITH CULLINAN AND CULLINAN ASSOCIATES, INC. WITH PREJUDICE

This Order having been tendered by plaintiffs City of Louisville (the "City") and John H. Nevin ("Nevin"), the Court being duly and sufficiently advised,

Appendix E

IT IS HEREBY ORDERED that, pursuant to CR 41.01(2), the claims of the City and Nevin against defendants R. Keith Cullinan and Cullinan Associates, Inc., alleged in the actions identified above, are dismissed with prejudice. The Order is not intended to, and does not, dismiss, release, compromise or impair any claims, alleged or unalleged, known or unknown, which the City and Nevin have alleged or may allege in the actions identified above against defendants Shearson Lehman Brothers, Inc., C. Theodore Phillips, Anthony R. Trusty, Thomas H. Carrico, Billy R. Epperson, John L. Winstead, Sr., Brent O. Hardin, and Bobby W. Branham.

Entered this 7th day of July, 1993.

s/ Thomas J. Knopf
Thomas J. Knopf, Judge
Jefferson Circuit Court

Appendix E

Tab Twelve

CITY REACHES SETTLEMENT IN POLICE PENSION FUND

By MARY O'DOHERTY, Staff Writer

City officials this week trumpeted an important development in their expensive legal battle over the management of the Policeman's Retirement Fund:

They announced that Stock Yards Bank & Trust Co., which managed the fund from 1978 to 1990, agreed to pay the city $175,000 to end its part of the lawsuit.

A city spokeswoman called the settlement a step forward in the city's efforts to change the way the fund is managed and toward resolving the 3-year-old lawsuit.

But lawyers representing the parties remaining in the litigation say the settlement is a sign that the city finally realizes it can't prove the damaging claims it made.

They point to the city's decision to release one of its key targets from the lawsuit without asking him to pay a penny. R. Keith Cullinan, who manages most of the pension fund's assets, was shocked to learn Thursday that he had been released from the lawsuit. He said the city has never tried to talk to him about reaching a settlement.

"This is the city's attempt at peace with honor," said Ed Black, a lawyer for the pension fund.

Appendix E

The city has spent about $460,000 in its bitter court battle with a group of retired city officers and the board of their $31.5 million pension fund. Since 1989, nine lawsuits have been filed in the dispute.

The legal battle revolves around two main issues: $3.4 million the city took from the pension fund in 1986 and the pension fund board's management of its assets.

The city took the money after most of its active officers switched to the state's pension plan, and the city learned that the cost of their transfer would be $4 million less than it expected.

The settlement reached this week involves a lawsuit the city filed in April 1990 against Stock Yards, Cullinan and his firm, Cullinan Associates, the five retired officers who control the pension fund board, and the fund's stockbrokers. The city charged that the five retired officers allowed Cullinan and the fund's stockbrokers to charge excessive fees and commissions.

Cullinan was in charge of Stock Yards' trust department from 1975 until 1989, when he left to start Cullinan Associates. Cullinan Associates was named in the city's lawsuit because the pension fund board voted to transfer most of the fund's investment management responsibilities to Cullinan when he left the bank.

City Law Director Tina Heavrin said Thursday that she was very pleased with the settlement. She said the fund has changed the way it pays commissions on stock transactions since the city sued, a sign, she said, that the suit is improving the fund's management.

Appendix E

Heavrin said the city decided to release Cullinan from the suit because Stock Yards officials requested that as part of its settlement. She said the city decided unilaterally to release Cullinan Associates because the firm managed the fund for only several months and "the time period was insignificant in terms of the whole picture."

But Stock Yards Chairman David H. Brooks said the bank asked only that Cullinan be released from the suit in his capacity as a former bank employee. Brooks said the city's press release about the settlement inaccurately suggested that Cullinan and his firm were released as a condition of the settlement.

The bank decided to settle with the city because bank officials were frustrated with the slow progress of the case — not because he thinks the bank or Cullinan did anything wrong, Brooks said.

The bank has spent more than $175,000 defending itself in the case, and Brooks said he believes it would cost at least $250,000 more to fight the city's claims to the end.

The city's press release noted that the settlement did not include several parties named in its initial complaint: Shearson Lehman Hutton Inc. and its stockbrokers, Anthony R. Trusty and C. Theodore Phillips, and the five retired police officers who control the fund's board.

"The city anticipates that litigation against these parties will continue," the release said.

But attorneys representing those individuals — including Frank Haddad, who represents the five retired officers who are

pension fund board members — said the settlement is a sign that the city realizes how weak its case is.

Thurman Senn, a pension fund attorney, said the small amount of the settlement "is piddling considering the allegations they made about the way the fund was mismanaged."

A few of the lawyers speculated that the city wanted Cullinan out because he has been such a visible thorn in Mayor Jerry Abramson's side during the past year. Cullinan and his sons, Roy and Brian, have bombarded the city with open records requests in an effort to gather information to fight the lawsuit and have been the sources of numerous negative media reports about the Abramson administration. The Cullinans even aided Peter Hayes, who ran against Abramson in the Democratic primary for mayor last week.

Cullinan and his attorney Ann Oldfather have also fought the case strenuously in court, and Cullinan has threatened repeatedly to sue the city for malicious prosecution.

The news that he was dropped from the lawsuit surprised Cullinan, but it hasn't changed his feelings about the city. Cullinan said its press release on the settlement is one more example of how it is continuing to blacken his reputation. He said the release inaccurately suggests that Cullinan and his firm were a party to the settlement negotiations and were dropped from the lawsuit because of the money Stock Yards paid the city.

"Obviously, I'm delighted to be vindicated, but not in the context of being painted as having made some sort of payment to be released," he said. "It will be nice not to continue to be accused by the city, but we have been damaged and ultimately [we're going] to be exonerated."

Supreme Court, U.S.
FILED
MAR 23 1998
CLERK

No. 97-1342

In The

Supreme Court of the United States

October Term, 1997

R. KEITH CULLINAN and
CULLINAN ASSOCIATES, INC.,

Petitioners,

vs.

JERRY E. ABRAMSON, CHRISTINA HEAVRIN, STUART P. JAY, EARL MAC UNGER, JOHN H. NEVIN, WILLIAM C. BOONE, GREENEBAUM, TREITZ, BROWN AND MARSHALL, SAMUEL D. HINKLE and CULVER V. HALLIDAY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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TABLE OF CONTENTS

Page

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE 1

ARGUMENT 3

I. THE SIXTH CIRCUIT CORRECTLY RELIED ON ESTABLISHED PRECEDENT FROM THIS COURT TO GRANT QUALIFIED IMMUNITY TO THE CITY'S OUTSIDE COUNSEL 3

II. CONTRARY TO PETITIONERS' CONTENTION, *RICHARDSON V. MCKNIGHT* IN NO WAY PRECLUDES THE SIXTH CIRCUIT'S GRANT OF IMMUNITY TO RESPONDENT JAY 10

III. NOT ONLY IS THERE NO CONFLICT AMONG THE CIRCUITS OVER THE ROLE A PUBLIC OFFICIAL MUST PLAY TO MERIT QUALIFIED IMMUNITY, BUT THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY ANALYSIS TO RESPONDENTS' CONDUCT 12

IV. PETITIONERS MISCHARACTERIZE THE SIXTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS WHICH, IN BOTH ITS STATEMENT OF THE RULE AND ITS APPLICATION TO THIS CASE, IS CONSISTENT WITH THIS COURT'S GUIDANCE AND IS NOT IN CONFLICT WITH EITHER THE PRINCIPLES OR APPLICATION OF QUALIFIED IMMUNITY ANALYSIS IN OTHER CIRCUITS 16

TABLE OF CONTENTS – Continued

Page

V. NO CONFLICT EXISTS AMONG THE CIRCUITS OVER THE AVAILABILITY OF QUALIFIED IMMUNITY TO RICO CLAIMS AND THE COURT OF APPEALS CORRECTLY APPLIED THE QUALIFIED IMMUNITY ANALYSIS TO PLAINTIFFS' RICO CLAIMS 22

A. All cases in which courts have addressed the issue have held that immunity defenses *are* available to RICO claims 23

B. The grant of qualified immunity to the RICO claims does not raise an important question of law that either has not been or should be settled by this Court 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES CITED:

Anderson v. Creighton, 483 U.S. 635 (1987) 17, 18, 26

Bogan v. Scott-Harris, 118 S.Ct. 966, 1998 WL 85313 at *6 (March 3, 1998) 9

Burke v. FBI, Civil No. C-84-2078 (N.D. Ohio, June 5, 1985) 24

Calhoun v. Gaines, 982 F.2d 1470 (10th Cir. 1992)..... 19

Chappell v. Robbins, 73 F.3d 918 (9th Cir. 1996)....23, 25

City of Louisville v. Stock Yards Bank & Trust Co., 843 S.W.2d 327 (Ky. 1992) 1, 14

Clinton v. Jones, 520 U.S. ___, 137 L.Ed.2d 945, 117 S.Ct. 1636 (1997).....9, 12, 13

Cope v. Heltsley, 128 F.3d 452 (6th Cir. 1997)..... 17

Cullinan v. Abramson, 128 F.3d 301 (6th Cir. 1997)...*passim*

Demery v. Kupperman, 735 F.2d 1139 (9th Cir. 1984) 6

Ehrlich v. Giuliani, 910 F.2d 1220 (4th Cir. 1990) 23

Forrester v. White, 484 U.S. 219 (1988) 9

Greene v. McElroy, 360 U.S. 474 (1959).....20, 21

Guerico v. Brody, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991)..... 17

Hancock v. Vongarlem, 1989 WL 11710 (D.D.C. 1989)..... 23

K. H. Through Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990) 18

Lassiter v. Alabama A&M Univ., Bd. of Trustees, 28 F.3d 1146 (11th Cir. 1994)..... 17

TABLE OF AUTHORITIES – Continued

Page

Lightner v. Tremont Auto Auction, Inc., 564 F.Supp. 1112 (N.D. Ill. 1983) 24

Linne v. Rideoutte, 971 F.2d 766 (D.C. Cir. 1992), *cert denied*, 507 U.S. 1004 (1993) 22

Lojo v. Paulos, 1995 WL 663259 (D.D.C. 1995) 25

McBride v. Village of Michiana, 100 F.3d 457 (6th Cir. 1996) 18

McCloud v. Testa, 97 F.3d 1536 (6th Cir. 1996) 18

Meade v. Grubbs, 841 F.2d 1512 (10th Cir. 1998) 6

Mitchell v. Forsyth, 472 U.S. 511 (1985) 26

Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668 (7th Cir. 1985) 6

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 20

Owen v. City of Independence, 445 U.S. 622 (1980) 26

Poe v. Haydon, 853 F.2d 418 (6th Cir. 1988) 26

Richardson v. McKnight, ___ U.S. ___, 138 L.Ed.2d 1032, 117 S.Ct. 2100 (1997) ..... *passim*

Rose v. Bartle, 971 F.2d 331 (3rd Cir. 1989) 25

Saylor v. Bd. of Educ. of Harlan Cty., Ky., 118 F.3d 507 (6th Cir. 1997) 17

SEIU v. County of San Diego, 35 F.3d 483 (9th Cir. 1994) 25

TABLE OF AUTHORITIES – Continued

Page

Shoultes v. Laidlow, 886 F.2d 114 (6th Cir. 1989) 6

Spear v. Town of West Hartford, 954 F.2d 63 (2nd Cir. 1992) 6

Supreme Court of Va. v. Consumers Union of United States, Inc., 446 U.S. 719 (1980) 9

Thillens, Inc. v. Community Currency Exchange Assoc., 729 F.2d 1128 (7th Cir. 1984) 23

United States v. Lanier, 520 U.S. ___, 137 L.Ed.2d 432, 117 S.Ct. 1219 (1997) 18, 19, 27, 29

White v. Howard, 9 F.3d 111, 1993 WL 424972 (6th Cir. 1993) 23

Wyatt v. Cole, 504 U.S. 158 (1992) 7, 9, 26, 27

STATUTES AND RULES CITED:

18 U.S.C. § 242 ..... 18, 19, 27, 28

Sup. Ct. R. 10 5

Kentucky Rules of Professional Conduct Rule 1.2 7

APPENDIX

Complaint, *Cullinan v. Abramson, et al.*, Civil Action No. 94-00198-L-S .....App. 1

White v. Howard, 9 F.3d 111, 1993 WL 424972 (6th Cir. 1993) .....App. 39

Hancock v. Vongarlem, 1989 WL 11710 (D.D.C. 1989).....App. 41

Lojo v. Paulos, 1995 WL 663259 (D.D.C. 1995)...App. 45

RESPONSE TO PETITIONERS' STATEMENT OF THE CASE

While this case comes before the Court from the Respondents' assertions of qualified and absolute immunity defenses raised in motions to dismiss, it does not come in the normal Rule 12 context of a blank slate writ only with a completely untested complaint. Instead, many of the factual allegations on which Petitioners' claims rest arise out of six prior lawsuits, all addressing in some fashion or other concerns raised by the City of Louisville over the Petitioners' fiscal mismanagement of the City of Louisville Policemen's Retirement Fund.

The essence of Petitioners' claims in this case was that the two lawsuits brought by the City, in which Petitioner Keith Cullinan was named as a defendant, were frivolous and retaliatory. Petitioners' opinion of the City's lawsuits was not shared by the Kentucky Supreme Court which reversed the dismissal of the first of those two cases for lack of standing. The Court found that the City had appropriately filed the lawsuits inasmuch as it had the "duty, in the interest of sound public policy, to guarantee that active police officers have a dependable pension plan, one free of waste and mismanagement." *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 329 (Ky. 1992). And that case was thereafter settled with the City receiving compensation from Mr. Cullinan's former employer, Stock Yards Bank, for losses to the Pension Fund resulting from Mr. Cullinan's management.[1]

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[1] Petitioners for the first time in their Petition state that these lawsuits were "unilaterally dropped . . . because there was no evidence to support" the claims against them. Petition at p. 5. This is not true. Even the Petitioners' Complaint acknowledges that the cases were settled and Appendix E at pp. 137a-141a and

Still, the case does, in its voluminous detail, come before the Court from Rule 12 motions that did not attempt to answer the factual allegations of the Petitioners' 33-page Complaint, reproduced here in the Appendix at App. 1-38. While the Respondents wholeheartedly disagree with the Petitioners' characterization of the events underlying their claims, the accuracy or inaccuracy of the Complaint's allegations could not be raised below and is not material here.

For purposes of the appeal, the allegations of the complaint were taken as true by the Sixth Circuit which expressed approval of the "commendably fact specific" complaint and affidavit, from which it was able to determine that the individual defendants were entitled to qualified immunity for their roles in filing and pursuing the lawsuits in which the Petitioners were parties. This conclusion was undoubtedly correct given the indisputable fact that the City authorized the filing and litigation of these lawsuits and a city cannot act except its agents. Moreover, given the ethical restrictions on who can practice law, neither can a city litigate lawsuits other than through its lawyers.

As the agents of the City of Louisville carrying out the City's directives in all the events described in the Complaint, Respondents are individually immune from liability on Petitioners' claims. In so finding, the Sixth Circuit did not stray from the standards set by this Court for analyzing qualified immunity claims, did not indulge in an improperly lax standard, followed this Court's guidance in determining that private attorneys employed by the City to litigate its claims were entitled to the same

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151a-154a contain the settlement agreement and a newspaper article publicizing the settlement.

immunity as attorneys on the City's payroll, and ruled consistently with its own prior decisions and decisions of all other courts addressing the issue of qualified immunity to RICO claims.

The Petition raises a virtual smorgasbord of issues relating to the grant of immunity to the individual Respondents. What is missing from the five attempts to interest this Court in Petitioners' case, however, is any argument that even comes close to asserting an issue worthy of a grant of certiorari. The claim that two issues raise conflicts in the circuits is simply untrue. The remaining issues erroneously assume that this is a United States Court of Appeals that would even consider reviewing decisions for alleged misapplication of a rule of law. No issue is raised in the Petition that either should be settled by this Court or was decided by the Court of Appeals in a way that conflicts with any relevant decisions of this Court. Accordingly, no issue is raised that would be appropriate for review by this Court.

ARGUMENT

I.

THE SIXTH CIRCUIT CORRECTLY RELIED ON ESTABLISHED PRECEDENT FROM THIS COURT TO GRANT QUALIFIED IMMUNITY TO THE CITY'S OUTSIDE COUNSEL.

In asking this Court to exercise its discretionary authority to review this case, Petitioners complain that the Court of Appeals erred in finding the City of Louisville's outside counsel eligible for qualified immunity. Petitioners' complaint is in reality, however, not with the Court of Appeals' decision but with the clear language and guidance on the issue of governmental immunity that this Court recently provided in *Richardson v.*

McKnight, ___ U.S. ___, 138 L.Ed.2d 1032, 117 S.Ct. 2100 (1997).

The Court of Appeals correctly relied on *Richardson v. McKnight* to find that history and policy require that attorneys working for and under the direct supervision of the City in this case be afforded the same immunity as the City's in-house counsel performing the same governmental function.[2] In *Richardson*, this Court refused to recognize a qualified immunity for employees of a private prison corporation hired to manage a state correctional center. In so holding, the Court looked first to history, which it concluded reveals no tradition of immunity for privately employed prison guards. *Id.* at 2104 (finding that private contractors frequently took complete control over prison management in the 19th Century). This Court's obviously extensive historical research uncovered that private lawyers hired by a governmental entity are another story.

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[2] The Court of Appeals held:

> As the Supreme Court recently had occasion to note, it appears that the common law "*did* provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign." *Richardson v. McKnight*, ___ U.S. ___, 117 S.Ct. 2100, 2105, 138 L.Ed.2d 540 (1997) (citations omitted) (emphasis in original). As Attorneys for the city, GTB & M et al. were clearly acting as the city's agents. The rationales for qualified immunity apply to these lawyers and their firm in about the same way they apply to defendant Heavrin, Louisville's sometime law director. We see no good reason to hold the city's in-house counsel eligible for qualified immunity and not the city's outside counsel.

Cullinan v. Abramson, 128 F.3d 301, 310 (6th Cir. 1997).

> Apparently the law **did** provide a kind of immunity for certain private defendants, such as doctors or lawyers who performed services at the behest of the sovereign. But we have found no indication of any more general immunity that might have applied to private individuals working for profit.

Id. at 2105 (citations omitted) (emphasis in original).

In their Petition seeking a review of this case, Petitioners Cullinan and Cullinan Associates, Inc. directly challenge the Supreme Court's research results in *Richardson*: "In sum, there is no common law precedent entitling private fee based attorneys to immunity from suit."[3] Petition at 11. This differing opinion as to an issue already addressed by the United States Supreme Court, however, is no ground for requesting a writ of certiorari in this case. *See* Sup. Ct. R. 10. The Court of Appeals explicitly, and appropriately, relied on the Supreme Court's conclusion that there is historical evidence supporting immunity for private attorneys carrying out governmental functions.

From a pure policy standpoint, the Sixth Circuit held that "[t]he rationales for qualified immunity apply to these [outside] lawyers and their firm in about the same way they apply to defendant Heavrin, Louisville's

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[3] Petitioners fault the Supreme Court's observations in this regard based on an English barrister/solicitor dichotomy. Of questionable relevance, and accuracy, their theories do not change the fact that the *Richardson* court found at least enough common-law evidence of immunity to distinguish private attorneys hired by a sovereign from the private prison guards denied immunity in *Richardson*.

sometime law director."[4] *Cullinan*, 128 F.3d at 310. Contrary to Petitioners' assertion, the Court of Appeals' holding comports completely with the Supreme Court's policy analysis in *Richardson*. The fact that the analysis required an opposite conclusion when applied to these private attorneys working for the City and under its direct supervision is neither ironic, as Petitioners state, nor in conflict with precedent.

The private prison guards who were denied qualified immunity in *Richardson* worked for a "large, multistate private management firm" which is "systematically organized to perform a major administrative task for profit" and "perform that task independently, with relatively less ongoing direct state supervision." *Richardson*, 117

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[4] In requesting this Court's review, Petitioners do not challenge the maxim that governmental in-house attorneys are entitled to immunity for their role in prosecuting civil actions on behalf of the governmental entity, as well they could not. As Respondents set forth fully below, incidents of courts granting immunity to government attorneys and officials who initiate and prosecute civil lawsuits for the public welfare are legion. *See Spear v. Town of West Hartford*, 954 F.2d 63 (2d Cir. 1992) (town manager and town attorney who respectively authorized and initiated suit against local newspaper immune from newspaper's subsequent claims of malicious prosecution and violation of First Amendment and due process rights); *Shoultes v. Laidlow*, 886 F.2d 114 (6th Cir. 1989) (City Attorney entitled to absolute immunity in bringing civil injunction action to enforce zoning ordinance); *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985) (state Attorney General immune for reviewing state contracts); *Meade v. Grubbs*, 841 F.2d 1512 (10th Cir. 1998) (Commissioner of State Department of Health immune from claims that she failed to initiate civil procedures concerning jail conditions); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984) (Deputy Attorney General immune from suit for participation in license revocation proceedings).

S.Ct. at 2106. The Supreme Court looked to the purposes underlying governmental immunity and found none would be furthered by extending immunity to these privately-employed prison guards.[5]

The *Richardson* Court stressed that it had "answered the immunity question narrowly" and solely in the context of a private firm "systematically organized to assume a major lengthy administrative task . . . with limited direct supervision." *Id.* at 2108. The Court's holding did not extend to individuals working for a governmental body: "The case does not involve a private individual briefly associated with a governmental body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision." *Id.* at 2108.

The Sixth Circuit correctly applied the *Richardson* policy standard to recognize qualified immunity for the private attorneys and their firm in this case. As it necessarily decided, unlike the employees of the private prison management firm, the City's outside attorneys in this case were not operating autonomously. While they were sometimes required to exercise their independent judgment and discretion, the private attorneys nonetheless were bound by the City's decisions on significant strategic actions. *See* Kentucky Rules of Professional Conduct Rule 1.2 ("A lawyer shall abide by a client's decision

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[5] The *Richardson* Court described the purpose of the immunity doctrine as

> protecting "government's ability to perform its traditional functions" by providing immunity where "necessary to preserve" the ability of government officials "to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."

Id. at 2105 (citing *Wyatt v. Cole*, 504 U.S. 158, 167 (1992)).

concerning the objectives of representation . . . and consult with the client as to the means by which they are to be pursued.").

In addition, the private attorneys were but briefly associated with the City of Louisville. Again unlike private prison guards, they were not systematically organized to manage an institution such as a state correctional institute. The private attorneys were for all effects and purposes the same as the City's in-house attorney. Indeed, in the underlying litigation, the City spoke and acted through Hinkle, Halliday and Boone, the members of the former law firm, GTB&M.[6] These attorneys served as co-counsel of record with the City's in-house counsel, Heavrin. As the Sixth Circuit realized, it would make no sense to grant immunity to the City's in-house attorney but to deny it for these private attorneys and their firm who were performing exactly the same tasks. Both need protection from meritless suits in order to vigorously protect the public's interest.

The Sixth Circuit's refusal to distinguish between a governmental entity's outside and in-house counsel when both are performing the same public services and under the same governmental control is supported by other recent decisions of this Court.

> As our opinions have made clear, immunities are grounded in "the nature of the function performed, not the identity of the actor who performed it."

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[6] The individually named Defendants, Hinkle, Halliday and Boone, were the only members of the firm actively involved in the litigation. The firm itself and the remaining partners are potentially liable only vicariously.

Clinton v. Jones, 520 U.S. ___, 137 L.Ed.2d 945, 117 S.Ct. 1636, 1644 (1997) (citing *Forrester v. White*, 484 U.S. 219, 229-230 (1988)).

In *Clinton* and *Forrester*, the Supreme Court in fact refused to extend absolute immunity to the President and a sitting judge, respectively, for unofficial and unprotected acts. In so doing, the Court looked not so much to the capacity of the person performing the act but to whether the action itself related to the immunity's justifying purposes. *Id.* Indeed, the Supreme Court very recently reiterated this policy with the reverse result, holding that otherwise non-legislative officials *are* entitled to legislative immunity when they perform legislative functions. *See Bogan v. Scott-Harris*, 118 S.Ct. 966, ___, 1998 WL 85313 at *6 (March 3, 1998), citing *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-734 (1980). The same rationale applies to the private outside counsel in this case who are performing the same protected functions as the in-house attorneys.

Petitioners cite this Court's decision in *Wyatt v. Cole* for the proposition that "the purpose behind qualified immunity is 'to safeguard government, and thereby protect the public at large, not to benefit its agents.' " Petition at 8 (quoting *Wyatt*, 504 U.S. at 168). This policy statement only further supports the Sixth Circuit's holding below. It matters not whether it is a private outside attorney or an in-house government attorney who pursues a legal matter at the "behest of the sovereign" and under the sovereign's direction. Immunity serves the same purpose of protecting the public's right to unencumbered representation.

There is, therefore, no reason, "compelling" or otherwise, for this Court to revisit the immunity question at issue below. The Sixth Circuit decision granting qualified

immunity to the City's outside attorneys in this case is consistent with the precedent of this Court.

II.

CONTRARY TO PETITIONERS' CONTENTION, *RICHARDSON V. MCKNIGHT* IN NO WAY PRECLUDES THE SIXTH CIRCUIT'S GRANT OF IMMUNITY TO RESPONDENT JAY.

Among the numerous government officials and agents sued by Petitioners in this action is Respondent Stuart Jay. Petitioners allege in their Complaint that Jay was the City of Louisville's Director of Finance and Budget and an *ex officio* member of the police pension fund's board of trustees. Oddly, they seek a writ of certiorari specifically on the ground that the Sixth Circuit ignored Jay's "status as a private person" in granting him qualified immunity.

The Sixth Circuit found that the Petitioner's own "papers leave no room for doubt" that Petitioner Jay was acting in an official capacity when the alleged conduct occurred. *Cullinan*, 128 F.2d at 310. Their own initial allegations notwithstanding, Petitioners complain to this Court that Respondent Jay "illegally" held the office of City finance and budget director because his home was located several hundred feet outside the city limits.[7]

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[7] The Sixth Circuit recognized that Respondent Jay held the position of, and was acting as, Finance and Budget director until 1992, when the residency issue was discovered. Jay then relinquished the official position but continued to serve in a governmental capacity as "special assistant" to the mayor. *Cullinan*, 128 F.3d at 305. The Court held

> (It is undisputed that Jay was functioning both as the finance director and as an *ex officio* member of the

Then, in a theatrical attempt to gain this Court's ear, they liken the Sixth Circuit's grant of immunity to Jay under these circumstances to a grant of immunity to a private citizen impersonating a police officer. Petition at 12. The differences are, of course, manifest and, contrary to Petitioners' purpose, actually illustrate the correctness of the Sixth Circuit's holding.

Unlike the police impersonator, Respondent Jay provided essential governmental services and performed official governmental functions with the full knowledge and countenance of the City. He worked directly for the government, within a system that can only effectively serve the public good through the "vigorous exercise of official authority" and "principled and fearless decision-making." *See Richardson*, 117 S.Ct. at 2105 (citations omitted).

The Sixth Circuit was correct to protect this type of activity. And, contrary to Petitioners' urging, the holding in no way conflicts with this Court's decision concerning the privately employed prison guards in *Richardson v. McKnight*. While the *Richardson* Court recognized a difficulty in employing a "purely functional approach" to certain immunity issues, it did so in the expressly limited context of "a private [prison management] firm, systematically organized to assume a major lengthy administrative task [managing an institution] with limited direct supervision by the government [which] undertakes that

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police pension fund board of trustees – and what counts, in our view, is the function; whether Jay was legally entitled to hold the offices he occupied is immaterial.)

Id. at 310.

task for profit and potentially in competition with other firms." *Id.* at 2106, 2108.

Richardson does not preclude a court from basing an immunity decision primarily on "the nature of the function performed", especially when the actor, like Respondent Jay, is both a public official and an agent of the government involved in essential governmental activities. *See Clinton v. Jones, supra* at 1636. No clarification is needed from this or any other court on that point.

III.

NOT ONLY IS THERE NO CONFLICT AMONG THE CIRCUITS OVER THE ROLE A PUBLIC OFFICIAL MUST PLAY TO MERIT QUALIFIED IMMUNITY, BUT THE COURT OF APPEALS CORRECTLY APPLIED THIS COURT'S QUALIFIED IMMUNITY ANALYSIS TO RESPONDENTS' CONDUCT.

Petitioners accurately state the legal principle defining the availability of qualified immunity to public officials. There is no question that, to merit qualified immunity, a government official must have been acting within his or her official capacity. There is no contest that a public official is not entitled to qualified immunity for acts taken outside the scope of his office, merely because he is a government employee. There is no conflict among the circuits on this issue. There is only a mischaracterization by the Petitioners of the Sixth Circuit's analysis of the roles and functions of the Respondents entitling them to qualified immunity.

Despite the gross disparity between both the kind of immunity in issue and the conduct for which the immunity was sought, Petitioners' citation to *Clinton v. Jones*, 520 U.S. ___, 137 L.Ed.2d 945, 117 S.Ct. 1636, to support

their argument that immunity is not available for "unofficial conduct," only underscores the correctness of the Sixth Circuit's decision. In *Clinton*, this Court was concerned with a request for a kind of immunity that not only does not exist[8] but was for "*unofficial* conduct." *Id.*, 137 L.Ed.2d at 960, 117 S.Ct. at 1643.

Petitioners do not really argue that Respondents' conduct was **not** official. Instead, they complain that "[t]he Court of Appeals never asked or even considered whether [the Respondents] were acting within the scope of their official duties or whether they were performing discretionary functions. . . . " Petition at 13. Their conclusion that the Sixth Circuit found Respondents "entitled to qualified immunity based purely on their identities as governmental employees" does not follow from this premise. Petition at 13.

Just as this Court in *Clinton* did not find it necessary to elaborate on why it believed that claims of sexual misconduct could not be construed as anything other than "*unofficial* conduct," neither did the Sixth Circuit in this case believe it had to explain why the alleged conduct of the Respondents was taken in an official capacity, given that it had described both their offices and their roles in the events about which Petitioners complained.

The Sixth Circuit commended the Petitioners for filing a sufficiently "fact-specific" complaint and affidavit so that the filings "present[ed] a reasonably clear picture of who the Defendants are and what they are supposed to have done." *Cullinan v. Abramson*, 128 F.3d at 310. The

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[8] In *Clinton*, the President sought a "temporary immunity from civil damages litigation arising out of events that occurred before he took office" for which there was no precedent. *Clinton*, 137 L.Ed.2d at 959, 117 S.Ct. at 1643.

Court of Appeals found that "the Plaintiffs' papers leave no room for doubt that Defendant Abramson was acting as the duly elected Mayor of the City of Louisville," that Respondent Jay "was acting as the City's director of finance and budget," and that Respondent "Unger was likewise acting as a City employee and *ex officio* member of the pension fund board." *Id.* From the Complaint, the Sixth Circuit discerned that Respondent Heavrin acted as the City's Law Director. *Id.* at 306. The Court then clearly identified the Respondent Law Firm and Lawyers as those retained by the City to represent it in its claims against the Petitioners. *Id.* at 310.

In particular, the Sixth Circuit described the role played by Respondent Nevin – the only party singled out by Petitioners as exemplifying the "legal significance" of the Sixth Circuit's "failure" to make the specific findings which it now asks this Court to make. In describing Mr. Nevin's "function," the Sixth Circuit stated that he was "a city employee who was a pension plan beneficiary, [who] had been asked [by the City] to bring the suit after the City's action had been dismissed for lack of standing; Nevin's counsel of record was defendant Christina Heavrin, the law director of the city." *Cullinan v. Abramson*, 128 F.3d at 306.

The Sixth Circuit did not err in concluding that the conduct for which Mr. Nevin was sued was taken in an official capacity. As the Sixth Circuit noted, Mr. Nevin was not originally the plaintiff in the City's lawsuit against trustees of the Retirement Fund and others, including Petitioner Cullinan – the City was. In that lawsuit the City had "alleged the existence of a scheme whereby improper fees and commissions were paid from the assets of the" Fund. *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d at 328. The defendants,

however, persuaded the trial court to dismiss the City's action for lack of standing. The defendants had "concede[d] that fund beneficiaries," e.g., Nevin, would have had standing to bring the lawsuit, but the Kentucky Supreme Court noted that "these individuals would have little motivation to bring suit secure in the knowledge that their pension benefits are guaranteed by the taxpayers of the City of Louisville." *Id.* at 329. The Kentucky Supreme Court reversed the dismissal of the City's lawsuit with directions that it be reinstated but, in the meantime, the City had refiled it in Mr. Nevin's name who, the defendants had conceded, undoubtedly had standing as a beneficiary of the Retirement Fund.

Accordingly, the City was forced – by Petitioner Cullinan's erroneous opposition to the City's standing to pursue the original lawsuit – to file in Mr. Nevin's name a lawsuit that the Kentucky Supreme Court held was not only an appropriate suit for the City to bring but, in addition, that the City had the "duty, in the interest of sound public policy" to bring. *Id.* If the City had the duty to bring the lawsuit, as the Kentucky Supreme Court found it did, but could not bring it in its own name, then it had no choice but to bring it in the name of its agent and the agent in whose name it was filed was unquestionably acting within the scope of his official capacity in complying with his employer's directive to do so.

Clearly, Mr. Nevin did not decide to sue Mr. Cullinan as a lark. The Sixth Circuit's finding that Mr. Nevin is entitled to qualified immunity is consistent with its understanding of the context of Mr. Nevin's being directed to act as a plaintiff in the City's stead and wholly contradicts Petitioners' claims that the Sixth Circuit found that he was "entitled to qualified immunity based purely on [his] identity as [a] governmental employee."

Petition at 13. As noted above, the same is true for each of the Respondents.

Granting the petition for writ of certiorari would not serve any meaningful purpose as the Sixth Circuit has, in fact, conducted the analysis Petitioners claim that it did not conduct. That analysis consisted of more than determining that the Respondents were government employees. Accordingly, this issue does not involve a "conflict among the circuits as to whether a party's status as a government employee automatically entitles that party to qualified immunity," and raises no grounds for granting the Petition.

IV.

PETITIONERS MISCHARACTERIZE THE SIXTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS WHICH, IN BOTH ITS STATEMENT OF THE RULE AND ITS APPLICATION TO THIS CASE, IS CONSISTENT WITH THIS COURT'S GUIDANCE AND IS NOT IN CONFLICT WITH EITHER THE PRINCIPLES OR APPLICATION OF QUALIFIED IMMUNITY ANALYSIS IN OTHER CIRCUITS.

Petitioners assert that there is a split among the circuits as to the level of factual specificity required to demonstrate that a right must be clearly established in order to defeat a public official's entitlement to qualified immunity and that the Sixth Circuit "improperly required a [sic.] 'extreme level of factual specificity,' . . . which conflicts with the legal norm standard applied by other circuits." Petition at pp. 15-16.

Petitioners' placement of the "test" of "extreme level of factual specificity" in quotations would lead a reader to deduce that those words are a direct quote from the Sixth Circuit's opinion and that such a test was in fact

applied by the Sixth Circuit in this case. Such a deduction would be in error. The quoted matter will not be found anywhere in the Sixth Circuit's opinion. Moreover, not only did the Sixth Circuit **not** apply such a test in this case, it has **never** applied such a test.

The test applied by the Sixth Circuit was that mandated by this Court in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), " 'that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Cullinan v. Abramson*, 128 F.3d at 310, *quoting Anderson v. Creighton*, 483 U.S. at 640. The Court of Appeals did observe that this test " 'clearly counsels the application of a fact-specific, as opposed to abstract, approach to qualified immunity questions.' " *Cullinan*, 128 F.3d at 310, *quoting Guercio v. Brody*, 911 F.2d 1179, 1184 (6th Cir. 1990), *cert. denied*, 500 U.S. 904 (1991). While it did not go into detail in this case, the Sixth Circuit has made it clear in other cases that the fact-specific "standard requires the courts to examine the asserted right at a relatively high level of specificity. . . . 'For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law in the circumstances.' " *Cope v. Heltsley*, 128 F.3d 452, 458-59 (6th Cir. 1997), *quoting Saylor v. Bd. of Educ. of Harlan Cty., Ky*, 118 F.3d 507, 515 (6th Cir. 1997), *quoting Lassiter v. Alabama A&M Univ., Bd. of Trustees*, 28 F.3d 1146, 1150 (11th Cir. 1994).

The Sixth Circuit recognizes that " '[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.' " *McBride v. Village of Michiana*, 100 F.3d 457, 460 (6th Cir. 1996), *quoting Anderson*, 483 U.S. at 635. In fact, the Sixth Circuit has held, on more than one occasion, that "the lack of specific Supreme Court or Sixth Circuit precedent 'is not a sufficient condition for concluding that the law is unclear on the subject and so qualified immunity must be granted to the defendant.' " *McBride*, 100 F.3d at 460, *quoting McCloud v. Testa*, 97 F.3d 1536, 1556 (6th Cir. 1996).

As the Sixth Circuit recognized, " '[t]he easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.' " *Id.*, *quoting K. H. Through Murphy v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990).

In reaching for a cert worthy issue, it may be that Petitioners mistook the standard the Sixth Circuit had applied to the due process requirement of a "fair warning" prior to a criminal prosecution under 18 U.S.C. § 242. In this Court's opinion overruling that standard in *United States v. Lanier*, 520 U.S. ___, 137 L.Ed.2d 432, 117 S.Ct. 1219 (1997), it described "the extreme level of factual specificity envisioned by the Court of Appeals [as] necessary in every instance to give fair warning" "that criminal liability may be imposed under § 242," i.e., "only if the constitutional right said to have been violated is first identified in a decision of this Court (not any other federal, or state court), and only when the right has been held to apply in 'a factual situation fundamentally similar

to the one at bar.' " This Court noted that the Sixth Court "regarded these combined requirements as 'substantially higher than the 'clearly established' standard used to judge qualified immunity' in civil cases under" § 1983. *Id.*, 137 L.Ed. 2d at 440, *quoting United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996).

Thus, it was in the context of a § 242 prosecution that the Sixth Circuit applied the "extreme factual specificity" standard described by Petitioners – not to a qualified immunity analysis under § 1983. Most importantly, the Sixth Circuit recognized that test as more rigorous than that applied in qualified immunity cases. Clearly, it would not have applied that more rigorous standard to its qualified immunity analysis undertaken in this case.

Whether there is a split among the circuits as to the level of factual specificity which will be required before the law in a particular situation will be considered to be "clearly established" is irrelevant since the Sixth Circuit clearly follows the test espoused by Petitioners. Accordingly, it is clear that this is the wrong case in which to address these allegedly disparate views.

Nor was the Sixth Circuit's standard misapplied in this case. The Sixth Circuit simply was not presented with any precedent having **any** factual similarity to this case, much less at least "some . . . factual correspondence" such that the defendants would "know well developed legal principles and" be able "to relate and apply them to analogous factual situations." *Calhoun v. Gaines*, 982 F.2d 1470, 1475 (10th Cir. 1992) (cited by Petitioners as reflecting "the less stringent 'legal norm' requirement applied in other circuits. . . . ").

In assessing Petitioners' claims, the Sixth Circuit read the complaint as asserting a "constitutional right not to be included as a defendant in the city's suit against the

elected pension fund trustees" and from certain trustees' "trying to persuade their fellow trustees to fire a money manager whose covered call writing strategy was considered, rightly or wrongly, to be ill-advised." *Cullinan*, 128 F.3d at 312. According to Petitioners, this description "miscast" their complaint, but would have been accurate had it stated, instead, that Petitioners were asserting a "constitutional right not to be **retaliated against** by being named in the city's **groundless** suit against the elected pension fund trustees" and from certain trustees' "trying **by threats and intimidation** to persuade their fellow trustees to fire a money manager whose covered call writing strategy was considered, rightly or wrongly, to be ill-advised." Petition at 18.

Even as recast by Petitioners, it is apparent that the Sixth Circuit could not have erred in failing to discern any factual correspondence between their complaint and the cases relied upon by the Petitioners as "clearly establishing" the "constitutional rights" alleged. Interestingly, while Petitioners relied below on *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), as establishing a clear right to be free from retaliatory action for exercising their First Amendment right to speak out on matters of public concern, they do not mention the case anywhere in their Petition, apparently conceding that the facts of that case are too far removed from their claims even to be counted as "analogous." In fact, Petitioners posit in their Petition **no** precedent establishing that principle and putting Respondents on notice that including them as defendants in the city's "groundless" suit in "retaliation" for their speech would violate their Constitutional rights.

Instead, Petitioners now rely **solely** on *Greene v. McElroy*, 360 U.S. 474, 492, 508 (1959), as establishing their Constitutional rights under factual circumstances

sufficiently close to this case. In *Greene*, this Court held that the Department of Defense could not deprive a government employee of his security clearance, and therefore his job, through "a proceeding in which [the employee] was not afforded the safeguards of confrontation and cross-examination," i.e., without procedural due process, because that would violate the Constitutional right "to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference. . . . " *Id.*

The Sixth Circuit was not satisfied that there was sufficient factual congruence between a Defense Department employee deprived of a security clearance without a proper hearing and a money manager for a pension fund being sued for losses resulting from making poor investment decisions. Respondents would submit that even a very liberal rendering of the clearly established law standard could reach no other conclusion.

Given that Petitioners posit **no** precedent of even vaguely comparable factual correspondence, it is irrelevant that there could be a split among the circuits over the minimum level of factual specificity required for the "clearly established law" analysis. Moreover, as is apparent from the standard actually applied by the Sixth Circuit, that court does not apply "too rigorous" a test and, therefore, this is not a case which would be useful for setting a more precise standard, even if the Court wished to do so.

V.

NO CONFLICT EXISTS AMONG THE CIRCUITS OVER THE AVAILABILITY OF QUALIFIED IMMUNITY TO RICO CLAIMS AND THE COURT OF APPEALS CORRECTLY APPLIED THE QUALIFIED IMMUNITY ANALYSIS TO PLAINTIFFS' RICO CLAIMS.

Respondents had sought both absolute and qualified immunity from the Petitioners' RICO claims. The Sixth Circuit addressed the absolute immunity issue at length, but ultimately passed on the question because of its conclusion that Respondents were entitled to qualified immunity from all Petitioners' claims. *Cullinan v. Abramson*, 128 F.3d at 309. Before doing so, however, the court said that it had "been given no reason to suppose that RICO was intended to abolish" absolute immunity and observed that "[I]t would be anomalous . . . if officials who are immune from suit for alleged violations of the Constitution itself should be denied immunity from suit for alleged violations of a statute that does not incorporate the Constitution – particularly a statute as amorphous as RICO." *Id.* at 308, *citing Linne v. Rideoutte*, 971 F.2d 766 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993) ("where the enactment of RICO was held not to have abrogated the immunities by which government officials and witnesses are protected from civil damage claims.").

Noting that there is "no Supreme Court or Sixth Circuit precedent that could properly be said to have informed the defendants that they could not do what they stand accused of doing without violating 'clearly established' rights conferred on the plaintiffs by the RICO statute," the Sixth Circuit applied the same qualified immunity analysis to the RICO claims as it did to the Petitioners' § 1983 claims. *Id.* at 317.

Petitioners petition for review of this decision because of the "need" for "clarity" as to "whether RICO claims can be subject to qualified immunity defenses." Petition at 21. Petitioners are particularly concerned "that individuals who engage in criminal conduct are entitled to qualified immunity." Petition at 21. Given the large number of cases in which courts have allowed immunities to be asserted to RICO claims, a conflict among the circuits on this question cannot really be said to exist. Additionally, this Court's recent application of the qualified immunity analysis to criminal prosecutions of public officials indicates that the clarification sought by Petitioners has already been provided.

A. All cases in which courts have addressed the issue have held that immunity defenses *are* available to RICO claims.

Petitioners imply that the issue of qualified immunity to RICO claims has arisen in only three cases in two circuits with indeterminate results. In fact, many courts in many cases have directly addressed the availability of immunity defenses to RICO claims, universally finding them applicable. Absolute immunity has been applied to RICO claims brought against public officials in the position of judges, legislators, and prosecutors. *Thillens, Inc. v. Community Currency Exchange Assoc.*, 729 F.2d 1128, 1130 (7th Cir. 1984); *Chappell v. Robbins*, 73 F.3d 918, 922 (9th Cir. 1996); *Ehrlich v. Giuliani*, 910 F.2d 1220, 1223-24 (4th Cir. 1990); and *White v. Howard*, 9 F.3d 111, 1993 WL 424972 (6th Cir. 1993) (unpublished disposition reproduced in Appendix).

Additionally, qualified immunity has routinely been allowed as a defense to RICO claims. For example, in *Hancock v. Vongarlem*, 1989 WL 11710 (D.D.C. 1989)

(unpublished opinion reproduced in Appendix at 41), the D.C. District Court noted that

> even if the plaintiffs had alleged a cause of action, their claim flounders on defendants' qualified immunity defense. For, even if the defendants' conduct with respect to the contracts were actionable, recognition of a federal civil claim of extortion would be a new development in the law not now 'clearly established.' . . . Nor has it been 'clearly established' that a RICO claim will lie against federal officers or a group of federal officers on account of their official misconduct.

Citing Burke v. FBI, Civil No. C-84-2078 (N.D. Ohio, June 5, 1985), *aff'd without opinion*, 798 F.2d 1413 (6th Cir. 1986). The D.C. Court recognized *Burke* as "authority, albeit in another context, that such an action would not lie," and found significant that, "[b]y contrast, plaintiffs cite no case establishing RICO liability of a federal officer or group of federal officers on account of misconduct of their official duties." *Id.*

Similarly, in *Lightner v. Tremont Auto Auction, Inc.*, 564 F.Supp. 1112, 1120 (N.D. Ill. 1983) (emphasis added), the Illinois District Court found that "the federal defendant's qualified immunity defense [would] not presently serve as a bar to the civil rights claim under § 1983 in Count IV **or the RICO claim** of Count VII." That court reasoned that the federal defendants had not yet shown "that they should not reasonably have expected that their investigation would violate these statutes," implying that the RICO count would be subject to dismissal because of the defendants' qualified immunity if they should demonstrate that element of the immunity defense.

Finally, while finding that the plaintiffs' allegations "that all the federal defendants were involved in some

type of RICO conspiracy falsely to indict and convict and incarcerate" did "not rise to the level of specificity required in a damages action against a federal official," the D.C. District Court in *Lojo v. Paulos*, 1995 WL 663259 (D.D.C. 1995) (unpublished opinion reproduced in Appendix at 45), "note[d] that it appears that the federal defendants are entitled to absolute or qualified immunity" and "[t]he motion to dismiss of the federal defendants must be granted."

As they did below, Petitioners continue to cite cases that they believe support their position that immunity defenses are not available to RICO claims. Petition at 20. These cases do not, however, even break the surface of the issue. In *Rose v. Bartle*, 971 F.2d 331 (3rd Cir. 1989), for example, no immunity defenses were asserted to the RICO claims. An argument similar to Petitioners' made in *Chappell* merited that court's admonition that it did "not consider it even persuasive authority, however, because the issue of immunity was never raised." *Chappell*, 73 F.3d at 925 n.3, *citing SEIU v. County of San Diego*, 35 F.3d 483, 489 (9th Cir. 1994) (rejecting as authority prior cases which reached contrary result without addressing dispositive underlying issue).

In fact, given the unanimity of federal courts on this issue, a case cannot be made for a split among the circuits on the availability of immunity defenses to RICO claims. The Court should deny the Petition.

B. The grant of qualified immunity to the RICO claims does not raise an important question of law that either has not been or should be settled by this Court.

Petitioners complain that the Sixth Circuit erred in applying "[t]he 'clearly established' *Harlow* test" to RICO

claims, because "RICO violations involve claims of criminal wrongdoing and unlawful acts. By definition, RICO claims involve allegations of intentional misconduct" and "the common law upon which § 1983 qualified immunity is based did not grant immunity for intentional misconduct." Petition at 20.

Petitioners' argument is undermined by a short review of some of the more important qualified immunity cases in which qualified immunity was applied to intended, willful action rather than negligent conduct. *See, e.g., Anderson v. Creighton,* 483 U.S. 635 (1987) (qualified immunity for warrantless search); *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (qualified immunity for wiretapping telephone); *Poe v. Haydon,* 853 F.2d 418 (6th Cir. 1988) (qualified immunity for sexual harassment).

Moreover, in enacting the RICO legislation, Congress did not expressly preclude the application of immunity as it must do to abrogate that defense. This Court has "accorded certain government officials either absolute or qualified immunity from suit if the 'tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' " *Wyatt v. Cole,* 504 U.S. 158, 163-64 (1992), *quoting Owen v. City of Independence,* 445 U.S. 622, 637, 63 L.Ed.2d 673, 100 S.Ct. 1398 (1980). While often referred to as "1983 immunities" because they are most often asserted in defense of Section 1983 cases, the immunities are available to any public official defendant in any case in which they would have been available at common law and have not been abrogated by Congress. For example, in finding the immunities available to Section 1983

public official defendants, this Court "determin[ed] whether there was an immunity at common law that Congress intended to incorporate in" 42 U.S.C. Section 1983 by looking "to the most closely analogous torts – in this case, malicious prosecution and abuse of process." *Id.* Thus, in *Wyatt*, this Court applied immunity defenses in the context of a defense to the *same intentional* tort as Petitioners level against these Respondents.

Petitioners argue that criminal conduct is qualitatively different than tortious conduct – even intentional torts – and, therefore, the availability of such immunity defenses at common law for tortious conduct does not apply to criminal conduct. The connection decried by Petitioners was, however, very recently made by this Court in *United States v. Lanier*, 520 U.S. ___, 137 L.Ed.2d 432, 117 S.Ct. 1219. In *Lanier* a state court judge was indicted under 18 U.S.C. § 242 for sexually assaulting women in his judicial chambers. The defendant asserted due process protections which required that he have "fair warning" that he was violating that statute, which makes it a criminal offense to act willfully and under color of law to deprive a person of rights protected by the Constitution or laws of the United States. *Id.*, 137 L.Ed.2d at 442. This Court held that the "fair warning" analysis for purposes of that defense to a criminal indictment was the same as the "clearly established" analysis employed in analyzing an immunity defense to civil liability for a constitutional violation under § 1983.

> In the civil sphere, we have explained that qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability,' . . . by attaching liability only if '[t]he contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing

> violates that right,' . . . So conceived, the object of the 'clearly established immunity standard is not different from that of 'fair warning' as it relates to law 'made specific' for the purpose of validly applying § 242. **The fact that one has a civil and the other a criminal law role is of no significance; both serve the same objective, and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes.**

Id., 137 L.Ed.2d at 445 (emphasis added).

Contrary to the arguments made by Petitioners, public officials facing criminal prosecution for violating constitutional or other statutory rights have long enjoyed immunity from prosecution analogous to public officials charged civilly with such violations. Had Respondents been subjected to criminal prosecution for the alleged RICO violations, they would have been entitled to "fair warning" of the scope of their criminal liability. They are equally entitled to civil immunity unless their allegedly "criminal conduct" has been "clearly established" under the existing law. Accordingly, the Sixth Circuit correctly applied the qualified immunity analysis to the RICO claims and there is no basis for granting the Petition.

CONCLUSION

Petitioners have not raised any issues meriting this Court's review on Petition for Writ of Certiorari. The Petition should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

R. KEITH CULLINAN

and

CULLINAN ASSOCIATES, INC.
22nd Floor, One Corporate Plaza
220 West Main Street
Louisville, KY 40202

Plaintiffs

vs.

JERRY E. ABRAMSON, MAYOR
City of Louisville
City Hall
Louisville, KY 40202

and

CITY OF LOUISVILLE

SERVE: Jerry E. Abramson, Mayor
City Hall
Louisville, KY 40202

and

STUART P. JAY
416 Mockingbird Hill Road
Louisville, KY 40207-1321

and

EARL MAC UNGER, Executive Administrator
Finance and Budget Department
City of Louisville
City Hall
Louisville, KY 40202

COMPLAINT

CASE NO. C'94 0198 L-S

(Filed Mar. 21, 1994)

and

CHRISTINA HEAVRIN
Director of Law
City of Louisville
City Hall
Louisville, KY 40202

and

JOHN H. NEVIN
4508 Dearing Avenue
Louisville, KY 40213

and

WILLIAM C. BOONE
The Levy Building
Third Floor
133 South Third Street
Louisville, KY 40202-1333

and

SAMUEL D. HINKLE IV
2650 Capital Holding Center
400 W. Market St.
Louisville, KY 40202-3377

and

CULVER V. HALLIDAY
2650 Capital Holding Center
400 W. Market St.
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and

GREENEBAUM, TREITZ,
BROWN & MARSHALL,
formerly a Kentucky
General Partnership

SERVE: John S. Greenebaum)
2700 First National Tower)
Louisville, KY 40202)
)
Defendants)

JURISDICTION

1. This is an action for relief under the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 et seq ("RICO") and for relief under the provisions of the Civil Rights Act, 42 U.S.C. §1983 et seq. There are pendent state claims.

2. This Court has jurisdiction of this action under 18 U.S.C. §1964(c), 28 U.S.C. §1343(a)(1), 28 U.S.C. §1343(a)(3) and 28 U.S.C. §1343(a)(4), and supplemental jurisdiction of all pendent state law claims under 28 U.S.C. §1367.

PARTIES

3. Plaintiff R. Keith Cullinan ("Cullinan") is and at all times material to this action has been a United States citizen and a resident of Jefferson County, Kentucky. Cullinan was an employee of Stock Yards Bank & Trust Company at all times alleged herein through January, 1990, subsequent to which he was an employee of Plaintiff Cullinan Associates, Inc.

4. Plaintiff Cullinan Associates, Inc. ("Cullinan Associates") is and at all times material to this action has been a corporation incorporated under the laws of Kentucky and transacting business in Jefferson County, Kentucky.

5. Defendant Jerry E. Abramson ("Abramson") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky.

6. Defendant City of Louisville ("City") is a municipal corporation and constitutes a city of the first class as outlined in the governmental organizational scheme of the statutes of Kentucky.

7. Defendant Stuart P. Jay ("Jay") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. Defendant Jay was appointed by Defendant Abramson as the City's Director of Finance and Budget, a position that he was not legally entitled to hold given his lack of residence in the City of Louisville.

8. Defendant Earl Mac Unger ("Unger") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At all times alleged herein he was an employee of the City of Louisville.

9. Defendant Christina Heavrin ("Heavrin") is and at all times material to this action has been a United States citizen, and a resident of the Commonwealth of Kentucky. At certain times alleged herein she was an employee of the City of Louisville.

10. Defendant John H. Nevin ("Nevin") is and at all times material to this action has been a United States citizen, and a resident of the Commonwealth of Kentucky. At all times alleged as to him, Nevin was an employee of

the City of Louisville and was a retired City police officer and a beneficiary of the Fund as hereinafter described.

11. Defendant William C. Boone ("Boone") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At certain times alleged herein, Defendant Boone was also a partner in the law firm of Greenebaum, Treitz, Brown & Marshall.

12. Defendant Samuel V. Hinkle, IV ("Hinkle") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At all times alleged herein, Defendant Hinkle was a partner in the law firm of Greenebaum Treitz Brown & Marshall.

13. Defendant Culver V. Halliday ("Halliday") is and at all times material to this action has been a United States citizen and a resident of the Commonwealth of Kentucky. At all times alleged herein, Defendant Halliday was employed by the law firm of Greenebaum Treitz Brown & Marshall.

14. Defendant Greenebaum Treitz Brown & Marshall ("GTBM") was at all times material to this action a Kentucky general partnership engaged in the practice of law. GTBM was the successor in interest to Greenebaum Boone Treitz Maggiolo & Brown. Plaintiffs state upon information and belief that GTBM ceased doing business as a partnership on December 31, 1993. Plaintiffs state upon information and belief that its managing partner was John S. Greenebaum, who is served in that capacity and as representative of the other partners in GTBM and any predecessor partnership. Plaintiffs state that all of the

actions complained of herein taken by Defendants Boone, Hinkle and Halliday were taken within the course and scope of their employment and/or partnership at GTBM and hence GTBM and its individual partners are vicariously liable for such actions.

FACTS COMMON TO ALL COUNTS

15. In November, 1985, Defendant Abramson was elected Mayor of the City of Louisville. He assumed office in January, 1986.

16. Prior to 1986 and for over twenty years, the active police officers employed by the City of Louisville, and the retired police officers formerly employed by the City of Louisville, contributed to, and accrued rights under, a Pension Fund (hereinafter the "Fund") established by the City of Louisville pursuant to the authority of then KRS 95.290 and Louisville General Codified Ordinances ("LCO"), §36.100 et seq.

17. As of May 1, 1986, the Fund had assets totaling $83.8 million in market value, and provided benefits for, or had members totalling, four hundred and seventy-two (472) retired officers and their beneficiaries and six hundred and forty-five (645) active officers.

18. Prior to 1984, police officers employed by the City were entitled to eighteen (18) sick days per year. Unused sick days could be accrued from year to year. The ability to accrue sick days ended in 1984, at which time the total of accrued sick leave equaled almost one hundred thousand (100,000) days.

19. The City faced the potential of being required to "repurchase" these unused sick leave days based upon their salary value, which was calculated by the City in 1984 to be $7,290,085.

20. Plaintiffs state upon information and belief that some or all of the Defendants, and most particularly Defendant Abramson, regarded the Fund as what is commonly referred to as an "overfunded" plan. Defendant Abramson determined to accomplish the transfer of the active police officers from the Fund to the County Employee Retirement System ("CERS") in order to avail the City of some or all of the monies in the Fund purportedly in excess of the monies required to actuarially cover Fund obligations and, simultaneously, to use monies not belonging to the City, but rather to the Fund itself, to discharge the City's current and future obligations.

21. Some of the Defendants, specifically including the City and Defendant Abramson, began to negotiate in early 1986 with the Fraternal Order of Police, Louisville Lodge No. 6 ("FOP"), the bargaining representative for the active police officers, for the division between the City and the FOP of monies belonging to the Fund, and not to either group. The FOP and the City ultimately agreed that the purported "excess" funds in the Fund would be allocated fifty-five percent (55%) to the FOP (presumably for the active duty officers), fifteen percent (15%) to the Fund and thirty percent (30%) to the City, and that each active police officer would receive Twenty Three Dollars and Four Cents ($23.04) for each accumulated sick day, for a total of approximately $2 Million.

22. Absent revision of the applicable statutes, the agreement reached by the City and the FOP would have been in violation of Kentucky Statutes and Louisville Ordinances. Plaintiffs state upon information and belief that Defendants or persons acting on their behalf had legislation introduced in the 1986 Kentucky General Assembly on February 24, 1986, and enacted on April 4, 1986, with an emergency clause requiring an immediate effective date. That legislation accomplished amendments to KRS 95.290 specifically requiring all police officers employed by the City in the future to participate in CERS, allowing active police officers to opt into CERS, and permitting the use of any so-called "excess funds" following entry of police officers into CERS "for use by the City for any other purpose it may elect . . . ," KRS 95.290(3)(d).

23. The City had been advised by an Attorney General's Opinion dated October 22, 1984, that a change in a City ordinance was all that was required to transfer active officers to CERS. However, absent amendment to KRS 95.290, the City could not have obtained Fund monies for its own uses.

24. On July 15, 1986, the City calculated that $3,955,540 of monies in the Fund were "excess" funds due to the transfer of the active police officers to CERS. These monies were disbursed from the Fund in accordance with the agreement between the City and the FOP, as referenced in Paragraph 21, above.

25. From 1986 to date, Plaintiff Cullinan voiced his opposition repeatedly to the City's taking of the so-called "excess funds" at meetings of the Fund and in informal

conversations with Trustees and other Fund representatives. Plaintiff Cullinan repeatedly urged the Fund to contest these actions by the City.

26. In 1986, Defendant Abramson had appointed Defendant Jay as the City Director of Finance and Budget. At the inception of his appointment and at all times subsequent thereto, Defendant Jay did not meet the requirements specified by statute for the City's Director of Finance and Budget in that he was not a resident of the City of Louisville. As such, all actions taken by Defendant Jay in his position as the City's Director of Finance and Budget were at all times *ultra vires* and unauthorized.

27. Plaintiff Cullinan, by virtue of his position as an employee with Stock Yards Bank & Trust Company, was in charge of investment management for a substantial portion of the Fund's assets since 1977. The investment strategy utilized by Plaintiff was known as covered option writing on high quality common stocks. Defendant Jay had been a long-time opponent of this investment strategy and had, in fact, disputed publicly the efficacy of this investment strategy.

28. Defendant Jay, by virtue of his appointment (albeit illegal) as the City Director of Finance and Budget, was an ex-officio member of the Fund's Board of Trustees. From the inception of his service on the Board of the Fund, Defendant Jay disagreed with the investment philosophy utilized by the Trustees and the selection by the Trustees of money managers for the Fund's assets. From the inception of his service on the Board of the Fund, Defendant Jay attempted to have Plaintiff Cullinan fired as one of the Fund's money managers.

29. In 1986, after and as a result of the split-up of the Fund incident to the transfer to CERS by the active police officers, the Fund Trustees sought an updated asset allocation study from its independent consultant of long standing, Callan Associates ("Callan"). After careful study, Callan recommended to the Trustees that the Fund's asset allocation, including that portion of the assets managed by Plaintiff Cullinan, not be changed materially. Defendant Jay disagreed with and refused to accept this recommendation.

30. On or about September 1, 1986, three new members were elected to the Fund's Board of Trustees. One of these members was an active duty police officer and two were retirees. They joined the two incumbent elected Trustees who were active duty police officers. The active duty police officers were employees of the Defendant City. Defendants Jay and Unger and other persons acting on behalf of the City attempted to coerce the elected Trustees to hire and fire stock brokers and money managers for the Fund as determined by the City, and specifically to fire Plaintiff Cullinan. When the Trustees would not acquiesce to the demands of the Defendants, Defendant City passed another ordinance in mid-1987 effectively firing the elected Trustees and requiring election of new Trustees.

31. On September 1, 1987, five persons were elected as new Trustees for the Fund, all of whom were retired police officers. Defendant City had supported certain candidates, including Defendant Nevin, who were not elected. Defendants Jay and Unger continued their efforts to influence these newly elected Trustees in the hiring and firing of brokers and money managers and with

regard to investment policies of the Fund. Specifically, these Defendants urged the Trustees to fire Plaintiff Cullinan.

32. Throughout their tenures as ex-officio Trustees, Defendant Jay and Defendant Unger claimed that brokerage commissions paid incident to Fund transactions were excessive, particularly as to assets managed by Plaintiff Cullinan. As a consequence, the Fund appointed a special committee chaired by the citizen appointee on the Fund's board to examine this issue. The Committee determined that brokerage commissions paid by the Fund were competitive and in many cases lower than those paid by similar funds. Although Defendant Jay seconded and voted for the motion to accept the Committee's findings, he nevertheless continued to charge that Plaintiff Cullinan permitted excessive commissions on Fund transactions.

33. In March, 1988, and due to Defendant Jay's and Defendant Unger's constant questioning of the Fund's investment performance, the Fund obtained a study from E.F. Hutton (now Smith Barney Shearson) that showed that the Fund assets managed by Stock Yards Bank and Trust Company under the direction of Plaintiff Cullinan had generated a net time-weighted rate of return of 14.75% per year for the preceding 10 years. Defendant Jay insisted on obtaining at City's expense a separate study by Merrill Lynch. The results of this study reflected an even better rate of return of 15.01% per year for the preceding 10 years.

34. Plaintiff Cullinan states on information and belief that the urging by Defendants Jay and Unger that

the Trustees fire Plaintiff Cullinan was for the purposes of silencing Plaintiff Cullinan's objections to the City's taking of the excess funds, of replacing Plaintiff Cullinan with a money manager selected by said Defendants who would be a friend and/or political associate of said Defendants and/or Defendant Abramson, of ensuring that the investment strategies of Defendant Jay would thereafter be followed by the Fund, and for the purpose of punishing Plaintiff Cullinan for his opposition to the desires of Defendants Abramson, Jay and Unger.

35. The Fund attempted to negotiate with the City for a resolution of the issue of the claimed "excess funds." This effort was unsuccessful. The beneficiaries of the Fund voted nearly unanimously to pursue a civil claim against the City for return of the so-called "excess funds." At the direction of the Fund, the attorney for the Fund filed suit against the City of Louisville on October 25, 1989, Civil Action No. 89CI-08065, Jefferson Circuit Court, Division 8, styled *Policemen's Retirement Fund of The City of Louisville, et al v. City of Louisville* (hereinafter "Suit No. 1"), alleging in general that the City illegally removed monies from the Fund and that the amendments to KRS 95.290 allowing use of Fund monies "for any purpose" were unconstitutional. That action also sought the return of $3,422,518 (plus interest and costs) from the City of Louisville.

36. On December 11, 1989, Defendant Abramson hired, without competitive bidding, Defendant Boone and the partnership then known as Greenebaum, Boone, Treitz, Maggiolo & Brown, and later known as GTBM, to

defend the City in Suit No. 1. Plaintiffs state on information and belief that Defendant Boone was initially responsible for supervision of the litigation, that Defendant Hinkle was later responsible for supervision of the litigation, and that Defendant Halliday worked on the litigation.

37. Without notice to the Fund, Suit No. 1 was dismissed on motion of the City by Order entered February 9, 1990. Despite this dismissal, of which Defendant Halliday received notice within several days, Defendant Halliday misrepresented to counsel for the Fund and to the Court the status of the litigation by not disclosing the dismissal of which he had knowledge until the appeal time had expired and by affirmatively taking steps which would lead counsel for the Fund to believe that the litigation was still pending and active. When counsel for the Fund ultimately discovered the dismissal of the suit, and sought by appropriate motion to reinstate the suit, Defendant Halliday and Defendant GTBM objected to and opposed those efforts. Despite those objections, the suit was reinstated.

38. Defendant Unger attended several meetings of the Fund at which Suit No. 1 was discussed, but he never reported that the suit had been dismissed.

39. On April 13, 1990, Defendant Boone advised counsel for the Fund that a retaliatory action would be filed against the five elected Trustees of the Fund personally and against Plaintiffs and others unless the Board agreed to meet certain conditions, which included, *inter alia*, that the Fund discharge Plaintiffs and certain of the Fund's stock brokers and not do business with them for

twenty (20) years, that Suit No. 1 be dismissed (which would result in the City's retention of the "excess" funds in toto), that the Fund acquiesce in the City's mandates regarding certain of the Fund's investment policies, that Defendant Abramson appoint all future Trustees, that the Fund Administrator resign, and that Defendant City through Defendant Jay be granted the right to approve all future bonuses to beneficiaries (despite a City ordinance requiring bonuses to be paid). Attached hereto as Exhibit 1 are the specific terms of the demand by Defendant Boone. Defendant Hinkle participated in these demands. Defendant Boone presented counsel for the Fund with a prepared Complaint, identical in all particulars to the Complaint which was filed as "Suit No. 2" immediately after the Trustees refused to acquiesce to this threat.

40. The demands by Defendant Boone, if met by the Trustees, would have required the Trustees to violate state statutes which vested the "exclusive authority relating to investments" of the Fund with the Trustees, not the City. K.R.S. 95.290(2).

41. On or about April 17, 1990, Defendant Boone or Defendant Hinkle offered to "split" with the Fund any recovery that might be made in what was to be "Suit No. 2."

42. Plaintiffs state on information and belief that the demands of Defendant Boone referred to in Paragraph 39, above, were made with the full authority of Defendants Abramson and Jay.

43. By those actions, Defendant Boone and Defendant Hinkle offered to confer a pecuniary benefit upon public servants by relieving them of the personal expense

of defending against and/or paying personally under the threatened lawsuit with the intent to influence the actions of the public servants as Trustees of the Fund.

44. Defendant Boone and/or Defendant Hinkle offered to confer a pecuniary benefit upon public servants by sharing with them, as beneficiaries of the Fund, any monies that might be recovered in what was to be Suit No. 2 with the intent to influence the actions of the public servants as Trustees of the Fund.

45. Defendant Hinkle, and Defendants Abramson, Jay, Unger and Heavrin acting through other persons, continued the threats and demands of Defendant Boone in subsequent meetings regarding Suit No. 1, specifically in December, 1992, or January, 1993, and August or September, 1993. By these actions, Defendants have offered to confer a pecuniary benefit upon public servants by relieving them of the personal expense of defending against and/or paying personally under Suit Nos. 2 and 3 with the intent to influence the actions of the public servants as Trustees of the Fund.

46. By these actions, Defendants Boone and Hinkle have violated K.R.S. 521.020, "Bribery of a Public Servant" which is punishable by imprisonment for more than one year and is a predicate act under 18 U.S.C. §1961.

47. By these actions, Defendants Boone and Hinkle have violated K.R.S. 518.020, "Commercial Bribery."

48. Defendants Boone, Hinkle, Abramson, Jay, Unger and Heavrin have conspired to violate KRS 521.020

and KRS 418.020 in violation of KRS 506.040, "Criminal Conspiracy."

49. Defendants Boone and Hinkle intentionally attempted to obtain the property of the beneficiaries of the Fund and of the elected Trustees, who were also beneficiaries, by threatening to accuse the elected Trustees of a criminal offense or to adversely affect them by the personal expense of defending against and/or paying personally under the threatened lawsuit, which would be filed as a wrongful use of their position as public officers, servants or employees.

50. By these actions, Defendants Boone and Hinkle have attempted to violate KRS 514.080, "Theft by Extortion," which attempt is a violation of KRS 506.010, "Criminal Attempt."

51. Defendants Boone, Hinkle, Jay and Abramson have conspired to attempt to violate KRS 514.080 in violation of KRS 506.040, "Criminal Conspiracy."

52. On April 19, 1990, the City filed an action, referred to herein as "Suit No. 2" and styled No. 90CI-03253, Jefferson Circuit Court, Division Eight, *City of Louisville v. Stock Yards Bank & Trust Co., et al*, against the five elected Trustees of the Fund personally, Plaintiff Cullinan, Plaintiff Cullinan Associates, Inc. and other defendants. Suit No. 2 alleged, *inter alia*, that Plaintiff Cullinan and Plaintiff Cullinan Associates had committed fraud, had mismanaged and conspired to mismanage Fund assets, had improperly diverted assets and had engaged in deceitful, fraudulent and illegal transactions concerning the monies in the Fund.

53. The filing of Suit No. 2 and the allegations made therein against Plaintiffs received widespread publicity, including prominent front page coverage in the Courier-Journal.

54. The allegations made in Suit No. 2 against Plaintiffs were false, misleading and not supported by any evidence.

55. On April 10, 1991, the Court dismissed Suit No. 2 on the ground that the City lacked standing.

56. Following dismissal of Suit No. 2, Defendant Jay approached Defendant Nevin and solicited Defendant Nevin's cooperation and assistance by serving as a plaintiff in a suit which would be identical in all respects to Suit No. 2. Nevin was then, and still is, a city employee in the capacity of Director of the Disaster and Emergency Services Department.

57. Prior to filing suit, Nevin sought and received what was purported to be an indemnification agreement from the City. On June 13, 1991, Defendants GTBM filed on behalf of Defendant Nevin a civil action styled No. 91CI-03889, Jefferson Circuit Court, Fifteenth Division, *John H. Nevin v. Stock Yards Bank & Trust Co., et al,* ("Suit No. 3") which was identical in all particulars to Suit No. 2.

58. Defendant Nevin had no personal knowledge of the allegations contained in Suit No. 3 and all of his information regarding the allegations in that suit were obtained from Defendant Jay, Defendant Unger and/or Defendants Hinkle and Halliday.

59. Defendant Nevin made no independent investigation of the truth or falsity of the allegations contained in Suit No. 3.

60. The filing of Suit No. 3 and the allegations made therein against Plaintiffs received widespread publicity, including prominent coverage in the Courier-Journal.

61. The allegation made in Suit No. 3 against Plaintiffs were false, misleading and not supported by any evidence.

62. Although Nevin's claims in Suit No. 3 are those of a private citizen and a Fund beneficiary, the City has undertaken to pay his legal fees and expenses, and the Law Director of the City of Louisville, Defendant Heavrin, is of record as Nevin's counsel and has provided services to Nevin as his personal attorney in Suit No. 3.

63. Defendant Nevin would not have appeared as plaintiff in Suit No. 3 absent the agreement of the City, as expressed by Defendant Heavrin, to provide indemnification to Defendant Nevin and to pay Defendant Nevin's legal fees and costs.

64. Suit No. 2 was reinstated by Order of the Kentucky Supreme Court on December 17, 1992.

65. Defendant City, acting by and through Defendant Heavrin, has refused to honor its legal obligation to provide counsel and/or indemnification to the five elected Trustees of the Fund in their defense of Suit Nos. 2 and 3.

66. The refusal to indemnify these five elected Trustees has been in bad faith and for the purpose of coercing a resolution of Suit No. 1 in the City's favor.

67. Defendants Abramson and Jay, and perhaps other employees or associates of the City acting at their direction, have repeatedly insisted and conspired to attempt to force the elected Trustees to terminate the business relationship between the Fund and Plaintiffs. The business relationship between the Fund and Plaintiffs constituted a valuable property right as did the right to transact business with whomever they chose and the right to make business decisions free of outside pressures, all of which said Defendants sought to obtain under the wrongful use of fear and coercion.

68. Defendant Boone and Defendant Hinkle, by the actions complained of in Paragraph 39, above, attempted to obtain the valuable property rights of the Trustees of the Fund to solicit and transact business with whomever they chose, of the elected Trustees to serve on the Board, to make business decisions free of outside pressures, and of the beneficiaries of Fund to seek the return of monies rightfully theirs.

69. Defendants Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, have continued, attempted to continue or conspired to continue the threats and demands of Defendant Boone in subsequent meetings regarding Suit No. 1, specifically in December, 1992, or January, 1993, and August or September, 1993. They have attempted to obtain, or conspired to obtain, the valuable property rights of the Trustees of the Fund to solicit and transact business with whomever they chose, of the elected Trustees to serve on the Board, to make business decisions free of outside pressures, and of the beneficiaries of Pension Fund to the return of monies rightfully theirs.

70. Defendant Jay has wrongfully refused to turn over to the Fund monies duly appropriated for it by the Board of Aldermen of the City of Louisville for fiscal year 1991-1992 pursuant to ordinance. This has been done for the purpose of coercing the Trustees to acquiesce in the demands of Defendant Jay and Unger and to increase the economic pressure on the Fund, and on the beneficiaries, for the purpose of forcing the Trustees to consent to the resolution of Suit No. 1. desired by the City, and in an attempt to convince the beneficiaries to remove the elected Trustees.

71. Defendant City has, at times, blocked the payment of bonuses required by law to be paid to the beneficiaries for the purpose of coercing the Trustees to acquiesce in the demands of Defendant Jay and Unger and to increase the economic pressure on the Fund and on the beneficiaries for the purpose of forcing the Trustees to consent to the resolution of Suit No. 1. desired by the City, and in an attempt to convince the beneficiaries to remove the elected Trustees.

72. The actions of Defendants City, Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, complained of in Paragraphs 67 through 71, above, affected commerce.

73. Defendants Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday have violated 18 U.S.C. §1951 which is a predicate act under 18 U.S.C. §1961.

74. The actions of Defendants Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday, complained of in Paragraphs 46 through 51 and 67 through 71, above,

were accomplished by the use of the mails and/or the telephones.

75. Defendants Boone, Hinkle, Abramson, Jay, Unger, Heavrin and Halliday have violated 18 U.S.C. §1952 which is a predicate act under 18 U.S.C. §1961.

76. Plaintiffs state on information and belief that persons acting on behalf of the Defendant City knew that Defendant Boone's services were being engaged for purposes other than merely defending Suit No. 1 at the time that the Board of Alderman originally approved the Personal Service Contract between GTBM and the City and that the Aldermen were misled when they approved the Personal Service Contract on December 26, 1989.

77. Plaintiffs state on information and belief that the Board of Aldermen were similarly misled as to the scope and nature of the services of Defendants Boone, Hinkle, Halliday and GTBM with respect to Suit Nos. 2 and 3, when the Personal Service Contract of GTBM was renewed by resolutions of the Board of Aldermen on April 10, 1990, August 14, 1990, July 23, 1991, February 25, 1992, July 28, 1992 and January 26, 1993.

78. Employees, agents or representatives of the City have repeatedly slandered and libeled Plaintiffs by publication of false statements impugning the honesty, character and ability of Plaintiff Cullinan and Plaintiff Cullinan Associates, and damaging them in their reputation, profession and business, specifically as follows:

a) June, 1992

Kathleen Partlow, spokesman for Defendant City and Defendant Abramson stated that "the Cullinans are crooks."

b) November, 1992

Andy L. Cherry, the citizens member on the Fund, and an associate of Defendant Jay, prepared and published false and misleading "comparisons" concerning the commission charges of the Fund and although knowing that there is no such requirement to do so, accused Plaintiffs of not seeking competitive bids on brokerage commissions.

c) January, 1993

Persons employed by the City state that "money is changing hands under the table" between Plaintiffs, the elected Trustees and others even though "they can't find any proof of it."

d) April 1, 1993

Defendant Abramson falsely advised Mrs. Helen Ramsey that Plaintiffs had initiated a lawsuit against the City causing the City to incur attorney's fees, and implying that Mrs. Ramsey's complaints re her bonuses were attributable to the actions of Plaintiffs.

e) May 31, 1993

Defendant Abramson, in a letter published in the Courier-Journal, referred to the "questionable management practices of the Fund," his "grave concern that police pensioners and widows of pensioners are not being well represented by the management of the Fund," and that "there are real questions as to whether the best interests of retired Louisville police officers and their widows are being served. Mismanagement of the Police Pension Fund is a legitimate

concern, best pursued through the legal system as the only way to protect the rights of the pensioners."

f) June 10, 1993

Letter from Andy L. Cherry to Senator Louie Mack stating that "the low level of benefits paid to those who receive pensions from the Policemen's Fund is almost entirely the result of questionable management practices of the Fund's Board of Trustees." Mr. Cherry again republished the same misleading and inaccurate comparisons referenced above.

g) July 26, 1993

Andy L. Cherry Letter to Editor published in the Courier-Journal on July 26, 1993, referring to "questionable investment practices" of the Policemen's Fund.

79. The actions of Defendants Boone, Heavrin, Abramson, Jay, Unger, Hinkle and Halliday were in furtherance of a scheme to deprive the Fund and its beneficiaries of the intangible right of honest services from their Trustees, money managers and brokers, and to deprive the taxpayers of the honest services of the Board of Aldermen in its review and supervision of personal services contracts. Some or all of these actions involved use of the telephones and mails in interstate commerce.

80. Defendant Jay has wrongfully refused to turn over to the Fund monies duly appropriated for it by the Board of Aldermen of the City of Louisville for fiscal year 1991-1992 pursuant to ordinance. Defendant City has, at times, blocked the payment of bonuses to beneficiaries. This has been done for the purpose of coercing the Trustees to acquiesce in the demands of Defendant Jay and Unger and to increase the economic pressure on the

Fund, and on the beneficiaries, for the purpose of forcing the Trustees to consent to the resolution of Suit No. 1. desired by the City, and in an attempt to convince the beneficiaries to remove the elected Trustees.

81. Defendants Jay and Unger have disputed the valuation of assets in the Fund in an effort to deny pension benefits to the beneficiaries of the Fund in order to exert pressure to affect the outcome of the various lawsuits, and to influence the Fund beneficiaries to replace their elected Trustees.

82. Defendants Boone, Heavrin, Abramson, Jay, Unger, Hinkle and Halliday have violated 18 U.S.C. §1341, or have conspired to violate 18 U.S.C. §1341, which is a predicate act under 18 U.S.C. §1961.

83. Defendants Boone, Heavrin, Abramson, Jay, Unger, Hinkle and Halliday have violated 18 U.S.C. §1343, or have conspired to violate 18 U.S.C. §1341, which is a predicate act under 18 U.S.C. §1961.

84. On April 23, 1993, after being faced with certain Court Orders compelling them to provide discovery, the City and Nevin entered into a Settlement Agreement with Stock Yards Bank & Trust Company of the respective claims made by them against Stock Yards Bank & Trust Company in Suit Nos. 2 and 3. The City and Nevin negotiated for, and required, dismissal of all claims made by them against Plaintiff Cullinan and Plaintiff Cullinan Associates, despite the fact that neither Plaintiff was at any time given notice of the settlement conferences, nor asked to contribute any monies to the settlement.

85. Despite concluding the settlement, Defendant City, Defendant Halliday and Defendant GTBM continued to act as if the claims of the City and Nevin against Plaintiffs were still active. Specifically, said Defendants sought and received discovery from Plaintiffs' counsel and involved Plaintiffs' counsel in the attempted preparation of Agreed Orders.

86. On May 27, 1993, the City issued a press release which falsely represented and implied that Plaintiff Cullinan had settled with the City, when in point of fact, the City was voluntarily dismissing as to him.

87. On May 27, 1993, the City issued a press release which falsely represented and implied that Plaintiff Cullinan Associates, Inc. had settled with the City, when in point of fact, the City was voluntarily dismissing as to it.

88. The purpose of the aforementioned press release was to hold the Plaintiffs out to the public in a false light, and to further defame, damage and embarrass Plaintiffs by giving the impression that one or both of them had paid to be released from the claims made in Suit Nos. 2 and 3 when in fact that was not the case.

89. Plaintiffs' counsel immediately notified Defendant Halliday that no Order should be presented to the Court purporting to accomplish the dismissal of either Plaintiff without prior notice to Plaintiffs' counsel. Despite this request, Defendant Halliday presented to the Court for *ex parte* signature an Agreed Order of Dismissal as to both Plaintiffs, which Order was entered by the Court on June 1, 1993, and thereafter used by the City in an attempt to justify the City's noncompliance with discovery Orders.

90. The *ex parte* Order of Dismissal referenced in the previous Paragraph was set aside on June 14, 1993. On July 7, 1993, Plaintiffs were dismissed from Suit Nos. 2 and 3 by Order attached hereto as Exhibit A. At no time did Plaintiffs pay any consideration for the entry of the dismissal as to them.

91. In June, 1993, the City confirmed that it had fired Defendant GTBM from its position as counsel for the City, and presumably as counsel for Defendant Nevin, in Suit Nos. 2 and 3.

92. The actions taken by Defendants were part of a scheme to accomplish various objectives, including but not limited to: a desire to prevent a suit by Louisville Firefighters to recover approximately $20 million in "excess funds" taken by the City; a desire to have the City, not the Fund Trustees, control the management of the assets remaining in the Fund; a desire to silence all opposition to the City's efforts to take actions that Plaintiffs Cullinan and Cullinan Associates and others believed would not be in the best interests of the Fund and its beneficiaries, including the taking of the "excess funds"; a desire to discredit the elected Fund Trustees by trying to force them to violate their fiduciary duties to the Fund and its beneficiaries; a desire to influence the Fund beneficiaries to remove the elected Trustees; a desire to thwart efforts to cause improvements to be made in the benefits available to the beneficiaries of the Fund; a desire to remove Plaintiffs as investment manager of a part of the Fund's assets; a desire to substitute investment managers and brokers and consultants and investment strategies of the City's choice for those duly

selected by the Fund's Trustees; a desire to replace Plaintiff Cullinan with a money manager selected by certain of Defendants who would be a friend and/or political associates of said Defendants or Defendant Abramson; a desire to cause changes in the asset allocation of the Fund's investments despite statutory prohibition of such actions; a desire on the part of Defendants Boone, Hinkle, Halliday and GTBM to obtain fees through no-bid personal service contracts awarded by Defendant City in concert with Defendants Abramson, Jay and Heavrin.

93. As a result of the actions alleged herein, Plaintiffs have been damaged in their person and their properties. Plaintiff Cullinan has sustained, and will in the future sustain, damages to his reputation and character, embarrassment, humiliation, emotional distress and mental and physical pain and suffering. In addition, Plaintiff Cullinan has lost and will lose business revenues and profits, and has lost and will lose business opportunities. Plaintiff Cullinan Associates has sustained, and will in the future sustain, damages to its reputation. In addition, Plaintiff Cullinan Associates has lost and will lose business revenues and profits, and has lost and will lose business opportunities. Plaintiff Cullinan is a shareholder of Plaintiff Cullinan Associates and as such he has been damaged due to the damages to Cullinan Associates. The damages complained of herein are yet to be fully ascertained, but are in excess of Ten Million Dollars ($10,000,000.00).

COUNT I.

[RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS CLAIM AS TO ALL DEFENDANTS OTHER THAN THE CITY]

94. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

95. Defendant City is an enterprise as defined in 18 U.S.C. §1961 whose activities affected interstate commerce.

96. Defendant GTBM is an enterprise as defined in 18 U.S.C. §1961 whose activities affected interstate commerce.

97. Defendants Boone, Hinkle and GTBM received income from the pattern of racketeering activity described herein and used or invested, directly or indirectly, part of such income in the operation of GTBM, as such constituting a violation of 18 U.S.C. §1962(a).

98. Defendants Boone, Hinkle and GTBM through the pattern of racketeering activity described herein, directly or indirectly, have acquired or maintained an interest in or control of GTBM, as such constituting a violation of 18 U.S.C. §1962(b).

99. Defendants Boone, Hinkle and GTBM are employed by or associated with GTBM and have conducted or participated, directly or indirectly, in the conduct of the affairs of GTBM through the pattern of racketeering activity described herein, as such constituting a violation of 18 U.S.C. §1962(c).

100. Defendants Abramson, Jay, Unger and Heavrin have through the pattern of racketeering activities described herein directly or indirectly maintained control of some of the affairs of the City, as such constituting a violation of 18 U.S.C. §1962(b).

101. Defendants Abramson, Jay, Unger, Heavrin, Boone, Hinkle and Halliday are employed by or associated with the City and have conducted or participated, directly or indirectly, in the conduct of the affairs of the City through the pattern of racketeering activity described herein, as such constituting a violation of 18 U.S.C. §1962(c).

102. Defendants Abramson, Jay, Unger, Heavrin, Boone, Hinkle, Halliday and Nevin have conspired to violate one or all of 18 U.S.C. §1962(a), (b) or (c), which constitutes a violation of 18 U.S.C. §1962(d).

103. Plaintiffs are innocent persons whose rights have been damaged by the activities of the Defendants as alleged in this Count.

104. Plaintiffs have been injured in their business and property as a result of the violations of Title 18 United States Code §1962 as alleged herein, and as such, Plaintiffs are entitled to recover from Defendants, jointly and severally, threefold the damages they have sustained, and the costs of this action, including a reasonable fee for their attorney.

COUNT II.

[WRONGFUL USE OF CIVIL PROCEEDINGS AS TO ALL DEFENDANTS]

105. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

106. Each and every one of the Defendants named herein has taken an active part in the initiation, continuation and prosecution of civil proceedings against Plaintiffs.

107. In doing so, each and every one of the Defendants acted without probable cause.

108. In doing so, each and every one of the Defendants acted primarily for a purpose other than that of securing the proper adjudication of the stated claim.

109. The proceedings were terminated in favor of both Plaintiffs.

110. As a result of the Defendants' wrongful use of civil proceedings, Plaintiffs have been damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

COUNT III.

[ABUSE OF PROCESS AS TO ALL DEFENDANTS]

111. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

112. Each of the Defendants has participated in the employment of legal process for purposes other than that for which it was intended by law to effect.

113. Each of the Defendants have acted willfully in using the legal process for improper purposes.

114. Each of the Defendants has jointly and severally caused Plaintiffs to be damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

COUNT IV.

[CIVIL ACTION FOR DEPRIVATION OF RIGHTS AS TO ALL DEFENDANTS]

115. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

116. Each of the actions taken by Defendants as alleged in this Complaint were under color of state law.

117. The actions of the Defendants, jointly and severally, subjected the Plaintiffs to the deprivation of rights, privileges and immunities secured to them by the Constitution and laws of the United States in violation of Title 42 United States Code §1983, specifically the right to freedom of speech secured to the people by the First Amendment and the right not to be deprived of property without due process of law.

118. Each of the Defendants named in this Count have conspired with two or more persons to deprive

Plaintiffs of the rights set forth in the preceding Paragraph, in violation of 42 U.S.C. §1985.

119. The actions of each of the Defendants were not taken in good faith.

120. Each of the Defendants has jointly and severally caused Plaintiffs to be damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

121. Plaintiffs are entitled to recover under this Count from all Defendants, jointly and severally, the costs of this action and their attorney's fees.

COUNT V.

[INTERFERENCE WITH PROSPECTIVE AND ACTUAL CONTRACTUAL RELATIONSHIPS AS TO ALL DEFENDANTS]

122. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

123. By the actions set forth herein, all Defendants have induced or otherwise caused current, former or prospective clients of Plaintiffs either not to continue their contractual relationships with Plaintiffs or not to enter into new contractual relationships with Plaintiffs.

124. The actions of Defendants as set forth in this Count were intentional.

125. Defendants have improperly interfered with Plaintiffs' prospective and actual contractual relationships and hence are subject to liability to Plaintiffs in that regard.

126. Each of the Defendants has jointly and severally caused Plaintiffs to be damaged in their person and property as set forth above. As such, Plaintiffs are entitled to recover from the Defendants, jointly and severally, their compensatory damages as alleged above.

COUNT VI.

[PUNITIVE DAMAGES AS TO ALL DEFENDANTS OTHER THAN THE CITY]

127. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

128. The actions of each of the Defendants as alleged herein and in all of the previous Counts were in willful, wanton and callous disregard of the rights of Plaintiffs, were taken intentionally, were performed in derogation of Plaintiffs' rights, and entitle Plaintiffs to an award of punitive damages.

129. The actions of each of the Defendants as alleged in the previous Counts were taken and performed with malice and oppression toward Plaintiffs and hence entitle Plaintiffs to punitive damages pursuant to KRS 411.182.

COUNT VII.

[INDEMNIFICATION BY DEFENDANT CITY]

130. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

131. By statute and ordinance, Defendant City is required to indemnify some or all of the Defendants named herein for some or all of the claims made by this Complaint.

132. Defendant City is liable to Plaintiffs for all damages awarded against Defendants it is required to indemnify.

COUNT VIII.

[DAMAGES FOR VIOLATIONS OF MISCELLANEOUS STATUTES AS TO DEFENDANTS JAY, UNGER AND HEAVRIN]

133. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

134. The acts of Defendants Jay and Unger as complained of herein, specifically including the efforts of Jay and Unger to coerce the Trustees to terminate Plaintiffs' business relationships with the Fund with the intent to confer a benefit upon other persons or to injure Plaintiffs or to deprive Plaintiffs of benefits were taken knowingly and constituted an unauthorized exercise of their official functions. As such, these activities constituted a violation of KRS 522.020, "Official Misconduct in the First Degree."

135. The refusal of Defendant Heavrin to provide indemnity to the elected Trustees as described herein was taken with the intent to injure the elected Trustees or to deprive them of benefits provided by ordinance. In taking such actions, Defendant Heavrin knowingly refrained from performing duties imposed upon her by law. As such, Defendant Heavrin has violated KRS 522.020, "Official Misconduct in the First Degree."

136. By providing a purported indemnity to Defendant Nevin, Defendant Heavrin, with the intent to injure Plaintiffs or to deprive Plaintiffs of a benefit, knowingly committed an act constituting an unauthorized exercise of her official functions by providing an indemnity to a private person acting in a private capacity. As such, these actions of Defendant Heavrin constituted a violation of KRS 522.020, "Official Misconduct in the First Degree."

137. The actions of Defendant Jay in refusing to transfer to the Fund monies duly appropriated to it by the Board of Aldermen as described herein were taken with the intent to injure the elected Trustees or the beneficiaries of the Fund or to deprive the Trustees or the beneficiaries of the Fund of a benefit, or for the purpose of injuring Plaintiffs, and were taken knowingly. By these actions, Defendant Jay refused to perform a duty imposed upon him by law or clearly inherent in the nature of his office. As such, Defendant Jay has violated KRS 522.020, "Official Misconduct in the First Degree."

138. All of the violations of statute complained of in this Count have caused damage and injury to Plaintiffs as alleged herein. As a member of the public, Plaintiffs are in the class of persons the statutes were designed to

protect. Accordingly, pursuant to KRS 446.070, Plaintiffs having been injured by the violation of these statutes, Plaintiffs are entitled to recover from Defendants Jay, Unger and Heavrin the damages they have sustained by reason of the violations mentioned herein.

COUNT IX.

[OUTRAGEOUS CONDUCT CAUSING SEVERE EMOTIONAL DISTRESS AS TO ALL DEFENDANTS]

139. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

140. By the actions alleged herein, all of the individual Defendants have, by extreme and outrageous conduct, intentionally or recklessly caused Plaintiff Cullinan to suffer severe emotional distress.

141. Defendants City and GTBM are vicariously liable for the acts alleged in the preceding paragraph.

142. All Defendants are liable to Plaintiff Cullinan for all damage occasioned to Plaintiff Cullinan by such actions.

COUNT X.

[DEFAMATION AS TO DEFENDANTS ABRAMSON AND CITY]

143. Plaintiffs adopt, reiterate and incorporate by reference those allegations contained in Paragraphs 1 through 93 set forth hereinabove.

144. Defendant Abramson defamed Plaintiffs by the statements hereinabove set forth.

145. Defendant City, acting by and through its various employees, agents and representatives, has defamed Plaintiffs by the statements hereinabove set forth.

146. The statements hereinabove set forth are actionable per se.

WHEREFORE, Plaintiffs, R. Keith Cullinan and Cullinan Associates, Inc., demand judgment against the Defendants, City of Louisville, Jerry E. Abramson, Stuart P. Jay, Earl M. Unger, Christina Heavrin, John H. Nevin, William C. Boone, Samuel D. Hinkle IV, Culver V. Halliday, and Greenebaum, Treitz, Brown & Marshall, jointly and severally, for compensatory damages as proven by the evidence; for treble damages as to all Defendants under Count I; for punitive damages as proven by the evidence; for their costs and attorney's fees incurred in the prosecution of this action; prejudgment interest from the date each item of damage was incurred until the date of judgment; postjudgment interest; a trial by jury, and such further relief as to which they may appear to be entitled.

/s/ Ann B. Oldfather
ANN B. OLDFATHER
Oldfather & Morris
One Mezzanine,
The Morrissey Bldg.
304 West Liberty Street
Louisville, KY 40202
502-589-5500
Counsel for Plaintiffs

Plaintiff, R. Keith Cullinan, states that he has read the allegations contained in the foregoing Complaint and the statements contained therein are true to the best of his knowledge and belief.

/s/ R. Keith Cullinan
R. KEITH CULLINAN

STATE OF KENTUCKY)
) :-
COUNTY OF JEFFERSON)

Subscribed and sworn to before me by R. Keith Cullinan, this 18th day of March, 1994.

My commission expires: 11/5/95.

/s/ Margaret S. Peabody
NOTARY PUBLIC, KY STATE AT LARGE

Robert James WHITE, Plaintiff-Appellant,

v.

Barry L. HOWARD, Alleged Judge; Albert L. Holtz, Alleged "Expert Witness"/ Mediator; State Bar of Michigan; Oakland County; State of Michigan, Defendants-Appellees.

No. 93-1548.

United States Court of Appeals, Sixth Circuit.

Oct. 19, 1993.

E.D.Mich., No. 92-75337, Cohn, J.

E.D.Mich.

DISMISSED.

Before: BOGGS and SUHRHEINRICH, Circuit Judges, and WEBER, District Judge.*

ORDER

Plaintiff Robert James White, proceeding pro se, appeals from a district court order dismissing his complaint, this case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed.R.App.P. 34(a). Defendant Holtz has moved to strike the plaintiff's brief.

Plaintiff brought this civil rights action against defendants "Unknown Parties," Judge: Barry L. Howard,

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* The Honorable Herman J. Weber, U.S. District Judge for the Southern District of Ohio, sitting by designation.

Albert Holtz, State Bar of Michigan, County of Oakland, and the State of Michigan, alleging deprivation of rights guaranteed by several Articles and Amendments of the United States Constitution and violations of sixteen Racketeer Influenced Corrupt Organization Act (RICO), 18 U.S.C. § 1961. In a memorandum and order dated November 3, 1992, the district court granted Judge Howard's motion to dismiss on the grounds of absolute judicial immunity, *see Stump v. Sparkman*, 435 U.S. 349, 362 (1978); and Holtz's motion for judgment on the pleadings because the complaint failed to state a claim against him. The court also dismissed the State of Michigan based on Eleventh Amendment immunity. *See Welch v. Texas Highways & Public Transp. Dep't*, 483 U.S. 468, 472-73 (1987). Subsequently, the district court granted Oakland County's motion to dismiss because no claim against the county was stated in the complaint. On March 19, 1993, the district court dismissed the claims against the State Bar of Michigan for failure to serve the defendant with process within 120 days from the filing of the complaint, and dismissed the complaint in its entirety.

Upon review, we concluded that the issues raised in the plaintiff's brief lack merit and that the district court properly dismissed the case. Accordingly the order of the district court, dismissing the case in its entirety, is hereby affirmed for the reasons set forth in the court's orders dated November 3, 1992, December 7, 1992, and March 19, 1993. Rule 9(b)(3), Rules of the Sixth Circuit. The motion to strike is hereby denied.

David HANCOCK, et al., Plaintiffs,

v.

Thomas A. VONGARLEM, et al., Defendants.

Civ. A. No. 88-2474-LFO.

United States District Court, District of Columbia.

Feb. 7, 1989.

MEMORANDUM

OBERDORFER, District Judge.

Plaintiffs are farmers who were parties to contracts with the United States Department of Agriculture ("USDA"), which contracts are authorized by the Food Security Act of 1985, 16 U.S.C. § 3801 et seq. The contracts provided generally that in consideration for plaintiffs' withdrawal of certain allegedly marginal land from production and, instead, planting a cover crop pursuant to an approved conservation plan and renting the land to agencies of the USDA, the USDA would pay plaintiffs $323,470.89 for performance of the conservation plan plus rent at the rate of $16,872 annually over 10 years for a total of $168,720.

Defendants are several state and local officials with responsibilities for administration of the Food Security program. The complaint alleges that "[a]t a time and place unknown to the Plaintiffs, the Defendants determined that they would like to see the CONTRACTS modified or terminated." Complaint, ¶ 19. To this end, it is alleged, "the Defendants conspired to use their influence to cause local officials of the [Agriculture] agencies in Colorado to refuse to allow the Plaintiffs access to forms and vouchers necessary to request payments under the

CONTRACTS" *Id.*, ¶ 20. The defendants allegedly "caused communications to be made to Plaintiffs that Defendants would not allow vouchers to be delivered unless and until the Plaintiffs consented to modifications of the CONTRACTS." *Id.*, ¶ 22. Plaintiffs claim that as a consequence of the actions of defendants' alleged conspiracy, payments due to plaintiffs under the contracts were not made, with resulting damage to plaintiffs' land, crops and forestry products, as well as losses on forced sales of property. The complaint charges that defendants' conduct is actionable extortion and violates the Racketeering Influenced Corrupt Organization ("RICO") statute, 18 U.S.C. §§ 1916-8, entitling them to treble damages. Meanwhile, plaintiffs have filed a parallel action in the United States Claims Court, alleging essentially that the administrative action of defendants with respect to these contracts was arbitrary and capricious and a breach of the contracts. *Hancock v. United States*, Claims Court No. 516-88C. That case remains pending.

The matter is presently before this Court on defendants' motion to dismiss. It is well taken and will be granted. Essentially, the motion points out that the complaint nowhere alleges "what conduct of any individual is at issue. . . . [T]here is no allegation of how any of the individuals singly, or in combination, undertook any action involving any of the plaintiffs." Defendants' Reply Brief at 3. This defect is fatal to both the extortion count and the RICO count. For example, the extortion count fails to allege that defendants realized any benefit from whatever they may have done to plaintiffs. The RICO count is defective for its failure to allege any "enterprise"

or any role of defendants in any "enterprise." The heightened pleading requirements established in this Circuit before senior government officials can be diverted from their duties to defend complaints about their official conduct require dismissal of this suit. *See, e.g., Martin v. Malhoyt*, 830 F.2d 237, 253 (D.C.Cir.), *reh'g denied*, 833 F.2d 1049 (D.C.Cir.1987).

Moreover, even if the plaintiffs had alleged a cause of action, their claim flounders on defendants' qualified immunity defense. For, even if the defendants' conduct with respect to the contracts were actionable, recognition of a federal civil claim of extortion would be a new development in the law not now "clearly established." Congress created no federal civil cause of action for extortion, and the availability of suit in the Claims Court, such as now in progress there, is an alternate remedy that would have precluded an implied cause of action for extortion. *See Schweiker v. Chilicky*, 108 S.Ct. 2460 (1988). Nor has it been "clearly established" that a RICO claim will lie against federal officers or a group of federal officers on account of their official misconduct. Indeed, there is authority, albeit in another context, that such an action would not lie. *See Burke v. F.B.I.*, Civil No. C-84-2078 (N.D. Ohio, June 5, 1985), *aff'd without opinion*, 798 F.2d 1413 (6th Cir.1986). By contrast, plaintiffs cite no case establishing RICO liability of a federal officer or group of federal officers on account of misconduct of their official duties.

Assuming, without deciding, that there is personal jurisdiction over each of the alleged nonresident plaintiffs by virtue of their acknowledgements of service and the general appearance of their counsel, and that venue is

properly alleged because this District is headquarters of defendants' agencies, the complaint must nevertheless be dismissed for the reasons stated.

ORDER

For reasons stated in the accompanying Memorandum, it is this 6th day of February, 1989, hereby

ORDERED: that defendants' motion to dismiss should be, and is hereby, GRANTED; and it is further

ORDERED: that the complaint is dismissed.

Frank LOJO, et al., Plaintiffs,

v.

James PAULOS, et al., Defendants.

CIV. A. No. 95-0165 (NHJ).

United States District Court, District of Columbia.

Oct. 25, 1995.

MEMORANDUM OPINION

NORMA HOLLOWAY JOHNSON, District Judge.

Before the Court are the motions to dismiss of all remaining defendants in this case. These defendants are Ralph Regula, Edward L. Gilbert, Wyn McCoy, the LTV Defendants,[1] Barbara Lockhart, William Burga, Judge James S. Gwin, Ken Saltz, Paul Santilli, James E. Davis, Hahn Loeser & Parks, and the Federal Defendants.[2] In its Order dated October 10, 1995, the Court dismissed, pursuant to Rule 4(m) of the Federal Rules of Civil Procedure, all of the defendants for whom plaintiffs had failed to file proof of service.

Plaintiffs have filed several motions: a motion to certify this as a class action lawsuit, a demand for jury trial, a motion for injunction, a motion to amend the

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[1] The LTV Defendants are those defendants named in the complaint as LTV Inc., LTV Steel, Inc., J & L Specialty Steel, Inc., Michael Hiemstra, Claude Konk, John McHale, Tim Medford, James Paulos, William Clark, and Gary Swenson.

[2] The Federal Defendants are J. Robert Kramer, Christian H. Stickan, Jeffrey Koftbar, John Simpson, Paul Shoquist, and Kristie Stafford.

complaint, and a motion to stay the Court's Order of September 15, 1995.

Background

Plaintiffs are former employees of Enduro Stainless Inc. They bring the 37-page complaint and all of its thirteen counts under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961, et seq. ("RICO"). In ruling on the motions to dismiss, the Court must treat the allegations of the complaint as true. *Berkovitz v. United States*, 486 U.S. 531, 540 (1988). Plaintiffs allege that from August 1984 to January 1995, defendants constituted an entity and formed a continuing enterprise:

> to defeat the Anti Trust Laws, and monopolize the stainless steel market, and control a labor union and control a newspaper, and under color of law cause a subversion of the laws, to systematically corrupt government and its agencies, and violate mail fraud and wire fraud sta[t]utes, and interstate commerce, and bankruptcy laws, to commit fraud; to conceal enterp[r]ise, the entity, and continue use of illegal funds; to deprive the former employees of Enduro of their right to liberty and property under the constitution; to defraud employees.

Complaint at p. 5, "General Allegation." It appears that almost all of the alleged facts upon which the complaint is based occurred in the mid to late 1980's in Ohio, the place where the steel mills were located and where plaintiffs reside. Plaintiffs appear to dispute the outcome of prior litigation involving Robert Newstat, former president of Enduro Steel. Newstat is currently serving a 20-

year sentence in Lewisburg, Pennsylvania, for using $ 1.5 million of Enduro money for personal use immediately prior to Enduro's declaring bankruptcy. Plaintiffs' main allegation is that defendants unlawfully caused the steel mill to close, causing plaintiffs to lose their employment.

Discussion

The Court has considered the complaint, the motions of the parties, and the memoranda in support of and in opposition to the motions. The Court will address each motion in turn.

1. Motion to Dismiss of the Honorable Ralph Regula

Ralph Regula, United States Representative from the 16th Congressional District of Ohio, moves to dismiss the complaint against him because plaintiffs make no allegations against him. Plaintiffs list him as a defendant on page 3 of the complaint, but make no other references to him. The Court agrees that plaintiffs have failed to state a claim against defendant Regula upon which relief may be granted, and accordingly will grant the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. Motion to Dismiss of Edward L. Gilbert

Edward Gilbert moves to dismiss the complaint against him. Plaintiffs identify Gilbert as "a resident of [the] Akron Ohio area and former attorney to Steel Workers." Compl. at 4. The complaint alleges that, around the time the steel mill was closing in the mid

1980's, the former employees of Enduro sought "legal help from defendant Attorney Guilbert [sic], and although representing them: Guilbert [sic] stated that they must not ever disclose that LTV shipped inferior quality hot bands to ENDURO's mill and forced it to close, that it was against their own interest." Compl. at ¶¶ 53, 91. Gilbert moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), arguing that the complaint fails to explain the conduct of which he is accused. Gilbert also moves to dismiss for lack of personal jurisdiction and because plaintiff has not followed Rule 8 of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim." Plaintiffs filed a responsive brief stating:

> Defendant Guilbert [sic] lost his license for what he did to Lojo; it was never known to – BAR – that Guilbert [sic] was part of racketeering[.]
>
> Attorney Gilbert did not appear and prosecute in state court.
>
> Attorney Gilbert after seven years of providing no information stated the files were lost. Lojo could not obtain their files. For seven years the racketeering in the paragraphs in the complaint harmed Lojo.
>
> Lojo did not know there was a racketeering enterprise that is in the paragraphs in Lojo's complaint because it was fraudulently concealed.
>
> When Lojo became aware of the racketeering enterprise Lojo filed a civil RICO suit.
>
> Lojo was diligent but the racketeers by fraudulent concealment and racketeering in complaint

> were able to conceal themselves and continue to threaten and harm Lojo.
>
> Supp. Mem. [# 73] at 2.

Plaintiff has not shown that this Court has personal jurisdiction over Gilbert. For defendants who do not reside within or maintain a principal place of business in the District of Columbia, the District's long-arm statute is the only basis for obtaining personal jurisdiction. *See Reuber v. United States*, 750 F.2d 1039, 1049 (D.C. Cir. 1984). The statute provides that a court in the District of Columbia may exercise personal jurisdiction over a defendant with regard to a claim arising from the defendant's:

> (1) transacting any business in the District of Columbia;
>
> (2) contracting to supply services in the District of Columbia;
>
> (3) causing tortious injury in the District of Columbia by an act or omission in the District of Columbia;
>
> (4) causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, [or] engages in any other persistent course of conduct . . . in the District of Columbia.
>
> D.C. Code § 13-423(a)(1)-(4) (1981).

Plaintiff has not alleged that Gilbert conducted business in the District, or that plaintiff suffered injury in the District as a result of Gilbert's actions. The Court lacks personal jurisdiction pursuant to D.C. Code § 13-423(a), and must dismiss the complaint against Gilbert under

Rule 12(b)(2) of the Federal Rules of Civil Procedure. Moreover, the Court agrees with Gilbert that plaintiffs have failed to follow Rule 8 of the Federal Rules of Civil Procedure, and that plaintiffs have not set forth a claim upon which relief can be granted pursuant to the standards set forth in RICO. *See* 18 U.S.C. § 1961, et seq.

3. Motion to Dismiss of Wyn McCoy

Defendant Wyn McCoy, identified in the complaint as "a resident of Canton Ohio area and the former trustee of the Enduro's estate in Bankruptcy," Compl. at 4, moves to dismiss the complaint against him for lack of personal jurisdiction, because the complaint is barred by the statute of limitations, and because plaintiffs lack standing.

To have standing under RICO, a plaintiff must allege a direct injury to the plaintiff. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). In *Warren v. Manufacturers Natl. Bank of Detroit*, 759 F.2d 543 (6th Cir. 1985), the Sixth Circuit held:

> Plaintiff also claims injury by reason of his loss of employment. His claimed injury as an employee is not a basis of an independent cause of action under RICO because of the corporate injury. Plaintiff lost his job because Paragon was forced into bankruptcy. The alleged acts of fraud were directed not toward plaintiff as an employee of Paragon, but rather were directed to Paragon as a corporate entity or person. Assuming the truth of plaintiff's claim, the fraudulent misrepresentation was made to Paragon, not to any individual as such. Any injury Warren suffered as a result of this fraud, here

> his lost employment, was merely incidental to the corporation's injury.

Id. at 544-45; *see also Frank v. D'Ambrosi*, 4 F.3d 1378, 1385 (6th Cir. 1993). Because plaintiffs' injuries, namely the loss of employment, were indirectly inflicted upon them by the alleged RICO activity, plaintiffs lack standing to bring this action. In addition, the Court notes that the statute of limitations period for RICO actions is four years. *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 156 (1987). It appears that plaintiffs have missed the four-year deadline with respect to defendant McCoy because the complaint alleges that defendants initially discovered and complained about his alleged fraud in late 1986 to 1988. Compl. at ¶ 89. The complaint was not filed until 1995. Plaintiffs also have not shown that this Court has personal jurisdiction over defendant McCoy. Accordingly, the Court must grant the motion to dismiss.

4. Motion to Dismiss of the LTV Defendants

The LTV defendants move to dismiss the complaint because plaintiffs fail to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6), because plaintiffs lack standing, and because plaintiffs have filed the complaint well beyond the four-year statute of limitations period. Plaintiffs allege that actions of the LTV defendants caused them to lose their employment in 1985. Compl. at ¶ 125. Plaintiffs state that they have known about the alleged conduct since 1986-89, Compl. at ¶¶ 46, 53, 60, 63, 89, 91, 116, meaning that they should have filed this complaint by 1994 at the very latest.

Plaintiffs also lack standing to bring the present action against the LTV defendants. As explained above, loss of employment that allegedly was the result of conduct in violation of RICO does not confer standing upon former employees because such injury is indirect, not direct. *Warren*, 759 F.2d at 545. Moreover, the Court notes again that plaintiffs have filed this complaint well outside of the statute of limitations period. The Court will grant the motion of the LTV defendants to dismiss.

5. Motion to Dismiss of Barbara Lockhart

Defendant Barbara Lockhart, identified in the complaint as "a resident of Canton Ohio and wife of Otis Lockhart a former employee of Enduro Stainless," Compl. at 5, moves to dismiss the complaint against her. For substantially the same reasons as set forth above with respect to the motions to dismiss of the other defendants, the Court must grant the motion of Barbara Lockhart. Plaintiffs lack standing, have filed the complaint outside of the statute of limitations period, and have not shown that the Court has personal jurisdiction over defendant Lockhart.

6. Motion to Dismiss of William Burga, Judge James S. Gwin, Ken Saltz, and Paul Santilli

Defendants William Burga, Judge James S. Gwin, Ken Saltz, and Paul Santilli, formerly representatives of a local of the United Steelworkers of America that represented a bargaining unit of Enduro's employees, move to dismiss the complaint under Fed. R. Civ. P. 12(b)(2) and 12(b)(6),

inter alia. Again for substantially the same reasons as set forth above, the Court must grant the motion to dismiss. Plaintiffs have not alleged that the Court has personal jurisdiction over these defendants, who live in Ohio. Moreover, plaintiffs lack standing and failed to bring this claim within the four-year statute of limitations period.

7. Motion to Dismiss of James E. Davis

Defendant James E. Davis, named in the complaint as "a resident of Massillon Ohio area and the editor of the Massillon Independent, a newspaper," moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(3) and 12(b)(6) for improper venue and failure to state a claim upon which relief can be granted. Plaintiffs allege that Davis refused to print the plaintiffs' side of the alleged controversy involving Enduro Stainless. Compl. ¶¶ 92, 115. Plaintiffs' complaint against Davis utterly fails to set forth a RICO claim. *See* 18 U.S.C. § 1961 et seq. Moreover, allowing such a cause of action may violate the First Amendment of the Constitution. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). The Court must grant the motion of James E. Davis to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

8. Motion to Dismiss of Hahn Loeser & Parks

Defendant Hahn Loeser & Parks moves to dismiss the complaint because plaintiffs filed it beyond the four-year statute of limitations period, because plaintiffs lack standing, and because the Court lacks personal jurisdiction over defendant. For substantially the same reasons as set forth above with respect to the motions to dismiss of

other defendants, the Court must grant the motion to dismiss of Hahn Loeser & Parks. Plaintiffs have not alleged that the Court has personal jurisdiction over this defendant, plaintiffs lack standing, and plaintiffs failed to bring this claim within the four-year statute of limitations period.

9. The Federal Defendants

The Federal Defendants move to dismiss the complaint pursuant to Fed. R. Civ. P. 8(a), 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6). For many of the reasons set forth above with respect to the motions to dismiss of other defendants, such as lack of standing and plaintiffs' filing the complaint outside of the statute of limitations period, the Court must grant the motion to dismiss. In addition, the complaint does not meet the heightened pleading standard required for Bivens[3] claims. The Supreme Court has determined that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). To this end, the Court of Appeals for this Circuit has developed a heightened pleading standard for *Bivens* claims alleging an unconstitutional motive. A *Bivens* plaintiff may not merely "allege facts consistent with lawful conduct and append a claim of

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[3] In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court held that a cause of action exists against federal officials individually for violations of a person's constitutional rights while acting in a federal capacity.

unconstitutional motive," because to permit such a lawsuit to proceed would "impos[e] on officials the very costs and burdens of discovery and trial that *Harlow* intended to spare them." *Siegert v. Gilley*, 895 F.2d 797, 801 (D.C. Cir. 1990), *affd. on other grounds*, 500 U.S. 226 (1991). Plaintiffs fail to identify a clearly established right which the federal defendants are alleged to have violated. Plaintiffs do not plead specific direct evidence of the federal defendants' intent to violate plaintiffs' constitutional rights. Plaintiffs' broad, conclusory allegations – that all the federal defendants were involved in some type of RICO conspiracy falsely to indict and convict and incarcerate Newstat – do not rise to the level of specificity required in a damages action against a federal official. The Court also notes that it appears that the federal defendants are entitled to absolute or qualified immunity. The motion to dismiss of the federal defendants must be granted.

10. Plaintiffs' Motions

Plaintiffs have filed several motions: a motion to certify this as a class action lawsuit, a demand for jury trial, a motion for injunction, a motion to amend the complaint, and a motion to stay the Court's Order of September 15, 1995. The Court must deny the motion to amend the complaint. According to Rule 15(a) of the Federal Rules of Civil Procedure, "A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so

requires." Because plaintiffs filed their motion to amend the complaint after responsive pleadings had been filed, the matter is left to the Court's discretion. The Court determines that it would not be appropriate at this stage in the litigation to allow plaintiffs to amend the complaint. The Court denies the remaining motions of plaintiffs as moot.

Conclusion

For the reasons set forth above, the Court grants the motions of defendants to dismiss and denies the motions of plaintiffs. This case is hereby closed. An appropriate Order shall issue.